# INDEX.

## Subject Index.


| | Page |
|---|---|
| Statement as to jurisdiction | 1 |
| Basis upon which it is contended that the Supreme Court has jurisdiction | 2 |
| Statutory provisions believed to sustain jurisdiction | 6 |
| Statutes of the State the validity of which is involved | 7 |
| Date of judgment and date of application for appeal | 11 |
| Nature of the case and rulings of the Court bringing the case within the jurisdictional provisions relied upon | 11 |
| Grounds upon which it is contended the questions involved are substantial | 17 |
| Stage of proceedings and manner in which federal questions were presented | 22 |
| The manner in which questions involved were passed upon by the Court | 24 |
| Excerpts from the record bringing the cause within the statute conferring jurisdiction on the Supreme Court | 28 |
| Copy of opinions on rendition of judgment | 45 |
| Cases believed to sustain the jurisdiction | 45 |
| Appendix "A"—Opinion of the Common Pleas Court | 49 |
| Appendix "B"—Opinion of the Court of Appeals | 56 |
| Appendix "C"—Opinion of the Supreme Court of Ohio | 56 |
| Appendix "D"—Statement of resources and liabilities of the appellant | 65 |
| Appendix "E"—Treasurer's duplicate of taxes assessed on personal property in St. Clairsville Village for the years 1928, 1929 and 1930 | 79 |


## Table of Cases Cited.


| | |
|---|---|
| *Aero Mayflower T. Co.* v. *Georgia Public Service Commission*, 295 U. S. 285 | 46 |
| *Carpenter* v. *Shaw*, 280 U. S. 363, 74 L. Ed. 478, 50 Sup. Ct. 121 | 47 |

| | Page |
|---|---|
| *Cudahy Co.* v. *Parramore*, 263 U. S. 418, 44 Sup. Ct. 153, 68 L. Ed. 366 | 47 |
| *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282, 42 Sup. Ct. 106, 66 L. Ed. 239 | 47 |
| *Doty* v. *Love*, 295 U. S. 64, 55 Sup. Ct. 558, 79 L. Ed. 1303 | 47 |
| *Erie Ry. Co.* v. *New York*, 233 U. S. 671 | 46 |
| *First National Bank of Gulfport, Miss.* v. *Adams*, 258 U. S. 362, 66 L. Ed. 661, 42 Sup. Ct. 323 | 2,16,21 |
| *First National Bank of Guthrie Center* v. *Anderson*, 269 U. S. 341, 46 Sup. Ct. 135, 70 L. Ed. 295 | 46 |
| *Georgia R. & Electric Co.* v. *Decatur*, 295 U. S. 165, 79 L. Ed. 1365, 55 Sup. Ct. 701 | 47 |
| *Hartford Steam Boiler Co.* v. *Harrison, etc.*, 301 U. S. 458 | 46 |
| *McCormick* v. *Market Bank*, 165 U. S. 538, 17 Sup. Ct. 433, 41 L. Ed. 817 | 47 |
| *Miller, Treasurer* v. *First Nat. Bank*, 46 O. S. 424 | 21 |
| *Missouri R. R. Co.* v. *Porter*, 273 U. S. 341 | 46 |
| *Napier* v. *Atlantic Coastline Ry. Co.*, 272 U. S. 605 | 46 |
| *N. C. and St. L. R. Co.* v. *Walters*, 294 U. S. 405, 55 Sup. Ct. 486, 79 L. Ed. 949 | 47 |
| *Near* v. *Minnesota*, 283 U. S. 697, 51 Sup. Ct. 625, 75 L. Ed. 1357 | 47 |
| *Northern Pacific Ry. Co.* v. *Washington*, 222 U. S. 370 | 46 |
| *Oregon and Washington R. R. and N. Co.* v. *Washington*, 270 U. S. 87 | 46 |
| *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664, 43 L. Ed. 850 | 2,16,17 |
| *Pennsylvania R. R. Co.* v. *Public Service Commission*, 250 U. S. 566 | 46 |
| *Roe* v. *Kansas*, 278 U. S. 191, 73 L. Ed. 259, 49 Sup. Ct. 160 | 47 |
| *Seabury* v. *Green*, 294 U. S. 165, 55 Sup. Ct. 373, 79 L. Ed. 834 | 47 |
| *Smith* v. *Cahoon*, 283 U. S. 553 | 46 |
| *Snyder* v. *Massachusetts*, 291 U. S. 97, 54 Sup. Ct. 330, 78 L. Ed. 674 | 47 |
| *Standard Oil Co. of California* v. *Johnson*, 119 P. (2d) 329, 62 Sup. Ct. 1168, 86 L. Ed. 1611 | 46 |
| *Ward* v. *Krinsky*, 259 U. S. 502, 42 Sup. Ct. 529, 66 L. Ed. 1033, 28 A. L. R. 1207 | 45 |




## Statutes Cited.


| | Page |
|---|---|
| Constitution of Ohio, Article XII, Section 2 | 12 |
| Constitution of the United States, 14th Amendment | 6,12,21 |
| General Code of Ohio: | |
| Section 5408 | 2,3,4,22 |
| Section 5409 | 8,22 |
| Section 5410 | 8,22 |
| Section 5411 | 8,22 |
| Section 5412 | 8,22 |
| Section 5413 | 9,22 |
| Section 5414 | 4,9,22 |
| Section 5672 | 2,3,4,10,22 |
| Section 5673 | 2,4,10,22 |
| Judicial Code, Section 237a and 237b (28 U. S. C. 344a and 344b) | 6,48 |
| Revised Statutes, Section 5219 from Act June 3, 1864, c. 106, Sec. 41, 13 Stat. 111; Act Feb. 10, 1868, c. 7, 15 Stat. 34) | 20 |
| United States Code, Title 28, Sec. 350 | 11 |

# IN THE SUPREME COURT OF THE STATE OF OHIO

**Cause No. 29198**

**(142 O. S. 6)**

THE SECOND NATIONAL BANK OF ST. CLAIRSVILLE, OHIO,

*Plaintiff-Appellee,*

*vs.*

HOMER J. FINDLEY, AS TREASURER OF BELMONT COUNTY, OHIO, AND E. E. TAYLOR, AS AUDITOR OF BELMONT COUNTY, OHIO,

*Defendants-Appellants.*

## STATEMENT OF JURISDICTION UPON APPEAL TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

Pursuant to the provisions of Rule No. 12 of the Supreme Court of the United States (1941), the above-named Plaintiff-Appellee in the Supreme Court of the State of Ohio, now Appellant to the Supreme Court of the United States and hereafter designated as Appellant, files this, its separate statement, particularly disclosing the basis upon which it is contended the Supreme Court of the United States has

jurisdiction upon appeal to review the Judgment of reversal appealed from herein, as follows:

*A.*

**Basis Upon Which It Is Contended That the Supreme Court Has Jurisdiction.**

The Supreme Court of the United States has jurisdiction in this case because there is drawn in question in it the validity of certain Statutes of the State of Ohio, to-wit: Section 5408 of the General Code of Ohio (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition) and Sections 5672 and 5673 of the General Code of Ohio (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition, or 102 Ohio Laws 91) on the ground of their repugnance, as construed in this suit by the Supreme Court of Ohio, which is the highest Court of that state in which a decision in this suit could be had, to Section 1 of the Fourteenth Amendment to the Constitution of the United States and to Section 5219 of the Revised Statutes of the United States (Section 548 of Title 12 of the United States Code) as construed by the Supreme Court of the United States in many cases but notably in the case of *Owensboro National Bank* v. *Owensboro* (1899), 173 U. S. 664, 43 Law Ed. 850, and the case of *First National Bank of Gulfport, Mississippi* vs. *Adams, Revenue Agent* (1922), 258 U. S. 362, 66 Law Ed. 661, 42 S. Ct. 323, in this, that:

1. The Supreme Court of Ohio erred in holding, in effect, that Section 5408 of the General Code of Ohio (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition) authorizes the County Auditor to list and assess taxes on the County Auditor's Tax Lists and the County Treasurer's Tax Duplicates, in the name of and against The Second National Bank of

St. Clairsville, Ohio (Plaintiff-Appellee in the Supreme Court of Ohio and Appellant in the Supreme Court of the United States), and that the same constitutes a valid assessment of taxes against the individual shareholders on the shares of the capital stock of the Bank held by them;

2. Said Court erred in holding, in effect, that Section 5408 of the General Code of Ohio, *supra,* authorizes the County Auditor to list and assess taxes on the County Treasurer's Tax Duplicates in the name of and against The Second National Bank of St. Clairsville, Ohio, on the net capital, surplus and undivided profits of the Bank, excluding real estate, in solido, or in a lump sum, and that the same constitutes valid taxes on the shares of the shareholders of the capital stock of the Bank;

3. Said Court erred in holding, in effect, that Section 5672 of the General Code of Ohio (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition, or 102 Ohio Laws 91) authorizes a penalty, against the said The Second National Bank, in the gross amount of the taxes assessed by the County Auditor on the Auditor's Tax Lists and the Treasurer's Tax Duplicates, in solido, or in a lump sum, in the name of and against the said Bank on the net capital, surplus and undivided profits of the Bank, excluding real estate, for failure of the Bank to collect from its individual shareholders undetermined sums, sufficient to equal the amount of said assessment in solido against the Bank, and to pay the same to the County Treasurer;

4. Said Court erred in holding, in effect, that the said The Second National Bank is required, under such an assessment of taxes in solido, to compute the amount

of the taxes due from each shareholder, and then to collect the same and pay the amount thereof to the County Treasurer, although nothing contained in the Statutes of the State of Ohio—Sections 5408 to 5414, inclusive, of the General Code of Ohio (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition), and Sections 5672 and 5673 of the General Code of Ohio (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition, or 102 Ohio Laws 91), or any other statute or law of Ohio—imposes such a duty on the Bank;

5. Said Court erred in holding, in effect, that Section 5672 of the General Code of Ohio (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition, or 102 Ohio Laws 91) makes a tax so listed and assessed a lien on the shares of the shareholders of the capital stock of the Bank until the same is paid;

6. Said Court erred in holding, in effect, that the liability of the said Bank, under Section 5672 of the General Code of Ohio, 1930 Edition, *supra,* to compute, collect and pay to the County Treasurer the taxes, from its individual shareholders, exists, even though the County Auditor has listed and assessed the same in solido, or in a lump sum, against the Bank, and has not apportioned, on the Auditor's Tax Lists and Treasurer's Tax Duplicates, and assessed to the individual shareholders of the Bank the respective amounts of taxes due from each;

7. Said Court erred in holding, in effect, that the taxes listed and assessed in the name of and against the said The Second National Bank on the net capital, surplus and undivided profits of the Bank, excluding real estate, is, under the provisions of Section 5672

of the General Code of Ohio (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition, or 102 Ohio Laws 91), a lien on the shares of the capital stock of the Bank belonging to the individual shareholders until the same is paid, and that such assessment imposes a duty on the Bank to determine the amount of taxes due from each individual shareholder and collect the same from each shareholder until it has collected the total amount assessed against the Bank, and then pay the same to the Treasurer of the County in which the Bank is located, and that such assessment imposes a liability, by way of penalty, for the gross amount of such taxes, upon the Bank for its failure to collect and pay said taxes;

8. Said Court erred in holding that:

> "The apportionment of the aggregate amount of taxes due on bank shares among the respective owners thereof is not a prerequisite to the enforcement of the liability of a (national) bank to collect the taxes due upon its shares of stock and pay same to the treasurer of the county by the provisions of Section 5672, General Code of Ohio";

9. Said Court erred in holding in effect, that the said Statutes of Ohio authorized the taxes so assessed and in question in this case, as valid taxes on the shares of the shareholders and thus imposed the obligation to pay the total amount of said taxes upon said Petitioner, by way of penalty, for failure to collect, and pay taxes so assessed, from its shareholders before the same became delinquent;

10. The privilege and immunity from the taxes in question in this case, as the same were assessed against Petitioner by the County Auditor on the County Audi-

tor's Tax Lists and the Treasurer's Tax Duplicates, were specially set up and claimed by Petitioner in all of the State Courts, under Section 1 of the Fourteenth Amendment to the Constitution of the United States and under Section 5219 of the Revised Statutes of the United States and under previous unreversed decisions of the Supreme Court of the United States, in the pleadings, in written and printed briefs and in oral arguments, and the Supreme Court of Ohio erred in refusing to sustain said privilege and immunity so claimed;

11. In reversing the Judgment of the Court of Appeals of Belmont County, Ohio, with respect to the invalidity of the taxes in question in this case.

The decision of the Supreme Court of Ohio in this suit was in favor of the validity of such Statutes of Ohio, as so construed.

*B.*

**Statutory Provision Believed to Sustain Jurisdiction.**

The Statutory provision believed to sustain the appellate jurisdiction of the Supreme Court of the United States is Section 237 (a) and (b) of the Judicial Code, as amended (Title 28, United States Code, Section 344 (a) and (b)) reading, to the extent relevant here, as follows:

"Section 237 (a). A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had * * *; or where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal * * *."

"(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for

review and determination, with the same power and authority and with like effect as if brought up by appeal, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had * * * where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution * * * or laws of the United States; or where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, or any * * * statute of * * * the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on appeal in a case where such right is conferred by the preceding paragraph; nor shall the fact that a review on appeal might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph."

*C.*

**Statutes of the State, the Validity of Which Is Involved.**

The Statutes of the State whose validity, as construed, is involved, are as follows:

G. C., Section 5408 (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition): "Shares or Capital of Banks, Incorporated or Unincorporated. All the shares of the stockholders in an incorporated bank or banking association, located in this state, incorporated or organized under the laws of the state or of the United States, and all the shares of the stockholders in an unincorporated bank, located in this state, the capital stock of which is divided into shares held by the owners of such banks and the capital employed, or the property representing it, in an unincorporated bank the capital stock of which is not divided into shares, located in this state, shall be listed at the true value in

money, and taxed only in the city, ward, or village where such bank is located."

G. C., Section 5409 (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition): "Tax on Real Estate of Bank. The real estate of a bank or banking association shall be taxed in the place where it is located in like manner as the real estate of persons is taxed."

G. C., Section 5410 (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition): "Names of Stockholders and Shares of Each. There shall be kept in the office at all times where the business of such bank or banking association is transacted, a full and correct list of the names and residences of the stockholders therein, and the number of shares held by each, which at all times during business hours shall be open to the inspection of all officers who are or may be authorized to list or assess the value of such shares for taxation."

G. C., Section 5411 (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition): "Return Made by Cashier, etc., to Auditor. The cashier of each incorporated bank, and the cashier, manager or owner of each unincorporated bank, shall return to the auditor of the county in which such bank is located, between the first and second Mondays of May, annually, a report in duplicate under oath, exhibiting in detail, and under appropriate heads, the resources and liabilities of such bank at the close of business on the Wednesday next preceding the said second Monday, with a full statement of the names and residences of the stockholders therein, the number of shares held by each, and the par value of each share, and of the amount of capital employed by unincorporated banks, not divided into shares, and the name, residence and proportional interest of each owner of such bank."

G. C., Section 5412 (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition): "Auditor to Fix Value of Bank Shares or Property. Upon re-

ceiving such report the county auditor shall fix the total value of the shares of such banks, and the value of the property representing the capital employed by unincorporated banks, the capital stock of which is not divided into shares, each according to their true value in money, and deduct from the aggregate sum so found, of each, the value of the real estate included in the statement of resources as it stands on the duplicate. Thereupon he shall make and transmit to the annual state board of equalization for banks a copy of the report so made by the cashier, manager or owner with the valuation of such shares or property representing capital employed as so fixed by the auditor."

G. C., Section 5413 (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition): "When Bank Fails to Make Return. If a bank fails to make and furnish to the county auditor the statement required, within the time herein fixed, the auditor shall examine the books of the bank; and also any officer or agent thereof under oath, with such other persons as he deems proper, and make such statement. The auditor shall have like powers, and the probate judge of the county shall exercise like powers, and perform like duties in aid of the auditor in the performance of his duties under this section, as are authorized by law in cases where the county auditor is informed, or has reason to believe, that any person has failed to make a return, or has made a false return for taxation. The statement so made out by the auditor shall stand as the statement required to be made by the cashier."

G. C., Section 5414 (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition): "Penalty for Making False Return. A bank officer who fails to make out and furnish to the county auditor the return required by section fifty-four hundred and eleven, or wilfully makes a false statement in such return, shall forfeit not more than one hundred dollars together with the costs and other expenses incurred by the auditor or other proper officer in obtaining such statement."

G. C., Section 5672 (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition, or 102 Ohio Laws 91): "Tax a Lien upon Bank Shares; Collection of Tax; Penalty. Taxes assessed on shares of stock, or the value thereof, of a bank or banking association, shall be a lien on such shares from the first Monday of May in each year until they are paid. It shall be the duty of every bank or banking association to collect the taxes due upon its shares of stock from the several owners of such shares, and to pay the same to the treasurer of the county in which such bank or banking association is located, as other taxes are paid, and any bank or banking association failing to pay the said taxes as herein provided, shall be liable by way of penalty for the gross amount of the taxes due from all the owners of the shares of stock, and for an additional amount of one hundred dollars for every day of delay in the payment of said taxes."

G. C., Section 5673 (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition, or 102 Ohio Laws 91): "Banks May Deduct Taxes Paid from Shareholders; When; Lien. Such bank or banking association paying to the treasurer of the county in which it is located, the taxes assessed upon its shares, in the hands of its shareholders respectively, as provided in the next preceding section, may deduct the amount thereof from dividends that are due or thereafter become due on such shares, and shall have a lien upon the shares of stock, and on all funds in its possession belonging to such shareholders, or which may at any time come into its possession, for reimbursement of the taxes so paid on account of the several shareholders, with legal interest and such lien may be enforced in any appropriate manner."

Said Statutes have been construed by the Supreme Court of the State of Ohio in this suit to authorize the listing and assessment of personal property taxes by the County Auditor on the Auditor's Tax Lists and the Treasurer's Tax Duplicates, in the name of and against Appellant,

which is a National Bank, on the net capital, surplus and undivided profits of the Bank, excluding real estate, in solido, as valid taxes on the shares of the capital stock of the Bank belonging to the shareholders, and as constituting a lien on such shares until paid, and as imposing a liability on the Bank to collect undetermined amounts from its shareholders to the amount thereof and pay the same to the County Treasurer, and as authorizing the County Treasurer to collect the amount of said taxes from the Bank, when the same become delinquent, as a penal liability of the Bank.

*D.*

**Date of Judgment and Date of Application for Appeal.**

The date of the Judgment of the Supreme Court of Ohio sought to be reviewed herein is June 30, 1943, and the date upon which the Application for Appeal was presented and the Appeal allowed was September 18, 1943. Under the provisions of Section 350 of Title 28 of the United States Code, the Appellant may bring its appeal within three months after the entry of the Judgment of the Supreme Court of Ohio.

*E.*

**Nature of the Case and Rulings of the Court Bringing the Case Within the Jurisdictional Provisions Relied Upon.**

This suit is a consolidation of three suits filed in the Common Pleas Court of Belmont County, Ohio, on July 27, 1929, February 18, 1930, and January 8, 1931, and numbered 31259 (R., page 189), 31804 (R., page 193) and 32732 (R., page 198), respectively, and consolidated by that Court by its order of April 8, 1935, (R., page 41) each of which cases was brought by Appellant, a National Bank, against the then incumbent County Treasurer and County Auditor

of that county, as such, to enjoin them in a First Cause of Action from collecting certain taxes listed and assessed by the County Auditor on the Auditor's Tax Lists and the Treasurer's Tax Duplicates for the years 1928, 1929 and 1930, respectively, in the name of and against Appellant, a National Bank, in solido, or in a lump sum, based on the net capital, surplus and undivided profits of the Bank, excluding real estate, and asking that such taxes be declared void for the following reasons: That there was no Statute of Ohio nor of the United States authorizing or permitting the Auditor to make said assessments of taxes against the Appellant and that the same were contrary to and in violation of Section 5219 of the Revised Statutes of the United States (Section 548 of Title 12 of the United States Code) and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and also in violation of Section 2 of Article 12 of the Constitution of Ohio in effect prior to January 1, 1931, and claiming that said taxes, as so assessed, were discriminatory because assessed at a greater rate than was assessed upon other monied capital coming into actual and direct competition in substantial amounts with Appellant's business. No evidence was introduced by Appellant in support of its claim that said taxes were discriminatory and that claim is not an issue in this case.

In a Second Cause of Action Appellant sought the recovery of similarly assessed taxes paid by it under protest for the years 1926 and 1927, but the Court of Appeals of Belmont County, Ohio, rendered a Judgment against the said Bank on that Cause of Action and the Bank did not appeal therefrom and the same is, therefore, not before this Court (R., page 48).

By order of the Common Pleas Court, dated May 10, 1939, the present County Treasurer of Belmont County, Ohio, Homer J. Findley, was substituted as party defend-

ant in each of said causes for his predecessors in office; and E. E. Taylor, present County Auditor of Belmont County, Ohio, was substituted as party defendant in each of said causes for his predecessors in office (R., page 30).

After the cause was heard in the Common Pleas Court, it was taken to and heard on appeal by the Court of Appeals of Belmont County, Ohio, which Court found in favor of the Bank, Plaintiff-Appellee in the Supreme Court of Ohio (Appellant in the Supreme Court of the United States) and against Defendants-Appellants in the Supreme Court of Ohio (Appellees in the Supreme Court of the United States), finding that said Bank was a corporation organized under the National Banking Laws of the United States of America and was, at all times, doing a general banking business in the Village of St. Clairsville, Belmont County, Ohio; that said Homer J. Findley is now the Treasurer of Belmont County, Ohio, and E. E. Taylor is now the Auditor of Belmont County, Ohio; that the cashier of the Bank and the Bank itself complied with all the provisions of the Ohio Statutes relative to the taxation of its shares; that the Auditor of Belmont County, Ohio, assessed taxes against the said The Second National Bank upon the amounts of its capital, surplus and undivided profits, excluding real estate,

For the year 1928 in the sum of $6,284.32.
For the year 1929 in the sum of $7,030.52.
For the year 1930 in the sum of $8,038.72.

and placed the same against said Bank upon the Auditor's Tax Lists and the Treasurer's Tax Duplicates for said years and transmitted the same to the Treasurer for collection from the Bank, but said Auditor did not, at any time, list or assess against the owners of the shares of capital stock of Appellant, for any of said years, a tax or taxes upon their shares in any amount whatsoever, and did not place on said Tax Lists or Tax Duplicates for said years

the values of the shares of the capital stock of Appellant in the names of the respective owners of such shares; and that said Auditor assessed a penalty against the Bank, when said taxes became delinquent in each of said years, of ten per cent of the amount of said taxes and added the same to the Auditor's Tax Lists and the Treasurer's Tax Duplicates in the name of and against the Bank and, thereafter, filed the same in the office of the Recorder of Belmont County, Ohio, for and thereby obtained liens against the real estate of the Bank; that said County Auditor and County Treasurer will, unless restrained by order of Court, take legal action against the Bank to collect such taxes and penalties; and that the Bank will suffer irreparable injury thereby; and that said assessments of taxes and penalties against the Bank, and the threatened collection thereof from the Bank are contrary to law and said taxes and penalties are illegal and void and the lien on the Bank's real estate is also illegal and void; and said Court thereupon forever enjoined said County Treasurer and County Auditor from collecting or attempting to collect said taxes and penalties from the Bank and cancelled the lien of the same on the Bank's real estate; and as to the Second Cause of Action for the recovery of taxes paid under protest for the years 1926 and 1927, it entered judgment for the County Treasurer and County Auditor; and finding that its judgment is in conflict with the judgment pronounced upon the same question by the Court of Appeals of Belmont County, it certified the record in the case to the Supreme Court of Ohio for review and final determination. (R., pages 44 et seq.).

The Supreme Court of Ohio thereafter heard the case and decided the same on June 30, 1943, being cause No. 29198 in that Court, as follows:

"1. Under the provisions of Section 5408, General Code, as in effect prior to January 1, 1931, all the

shares of the stockholders in an incorporated bank or banking association located in this state, incorporated or organized under the laws of this state or the United States, are required to be listed for taxation at their true value in money.

"2. The provisions of Section 5672, General Code, as in effect prior to January 1, 1931, making the taxes assessed on shares of stock in a bank or banking association a lien on such shares until paid, and imposing upon such bank or banking association the duty to collect the taxes due upon its shares of stock from the owners thereof and pay the same to the treasurer of the county in which such bank or banking association is located, and imposing upon any bank or banking association failing to pay such taxes a liability by way of penalty for the gross amount of taxes due from all the owners of the shares of stock, do not impose a tax on the bank and are not violative of the provisions of Section 548 of Title 12 of the Code of Laws of the United States prescribing the manner in which taxes affecting national banks may be levied and assessed.

"3. The placing of the levy of taxes on the tax duplicate against the bank instead of the respective owners of the shares of stock does not constitute the same a lien on the real estate of the bank.

"4. The apportionment of the aggregate amount of taxes due on bank shares among the respective owners thereof is not a prerequisite to the enforcement of the liability of a bank to collect the taxes due upon its shares of stock and pay same to the treasurer of the county by the provisions of Section 5672, General Code."

and entered its Judgment on said last-mentioned date in the following language, to-wit:

"January Term, A. D. 1943, to-wit: June 30, 1943.

"This cause came on to be heard upon the Transcript of the Record of the Court of Appeals of Belmont

County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the judgment of the said Court of Appeals, insofar as said decree orders that the pretended liens against the real estate of the Appellee, now appearing of record in the office of the Recorder of Belmont County, Ohio, be cancelled of record and that the Clerk of the Court issue a certificate releasing and discharging said taxes and penalties of record against the real estate of Appellee and insofar as the Court renders judgment for Appellants on the Second Cause of Action herein be and the same hereby is affirmed and it is further ordered and adjudged by this Court that in all other respects the judgment of the said Court of Appeals be and the same hereby is reversed and final judgment rendered in favor of the Appellants for the reasons stated in the Opinion rendered in this case.

"It is further ordered and adjudged that Appellants herein recover from Appellee their costs expended in this Court and in the Court of Appeals, taxed at $——.

"Ordered, that a special mandate be sent to the Court of Appeals of Belmont County to carry this judgment into execution." (Page 228 of Journal 37.) (R. —.)

The decision and Judgment of the Supreme Court of Ohio are contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States and to the provisions of Section 5219 of the Revised Statutes of the United States, as construed by the Supreme Court of the United States in many cases but notably in the case of *Owensboro National Bank* v. *Owensboro* (1899), 173 U. S. 664, 43 Law. Ed. 850, and the case of *First National Bank of Gulfport, Mississippi,* v. *Adams, Revenue Agent* (1922), 258 U. S. 362, 66 Law. Ed. 661, 42 S. Ct. 323.

*F.*

**Grounds Upon Which It Is Contended the Questions Involved Are Substantial.**

The questions involved in this suit are whether a state taxing official of the State of Ohio (the County Auditor) may list and assess a tax in solido, or in a lump sum, in the name of and against a National Bank, based upon the Bank's net capital, surplus and undivided profits, excluding its real estate; and thus make the same a direct liability of the shareholders of the Bank and a lien on their shares; and thus impose upon such bank the duty to collect such taxes from the shareholders and pay the same to the Treasurer of the County in which such Bank is located; and also impose upon any Bank failing to pay such taxes a liability, by way of penalty, for the gross amount of taxes so assessed, notwithstanding the fact that it has been held by the Supreme Court of the United States that:

> "1. A state is without power to tax national banks except under the permissive legislation of Congress.
>
> "2. Under United States Revised Statutes, Section 5219, the power of a state to tax national banks is confined to a taxation of the shares of stock in the names of the shareholders and to an assessment of the real estate of the bank * * *
>
> "4. A tax on a corporation or its property is not the legal equivalent of a tax on the stock in the names of the stockholders.
>
> "5. Taxes imposed on a national bank and its property and franchises and not upon the shares of stock in the names of the stockholders are void."—Owensboro National Bank *v.* Owensboro (1899), 173 U. S. 664, 43 Law. Ed. 850.

While the provisions of Section 5219 of the Revised Statutes of the United States have been amended since the

decision of the Supreme Court last cited, such amendments have not affected the validity of said decision for the reason that Section 5219 of the Revised Statutes of the United States, as amended, still authorizes the states to tax the shares of stock of a national bank as one of four methods of taxation and then provides, if a state imposes one of the four methods of taxation, it shall be in lieu of the others, in the following language, to-wit:

> Section 5219, Revised Statutes of the United States—"State Taxation. The legislature of each state may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several states may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:
>
> "1. (a) The imposition by any state of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.
>
> "(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state coming into competition with the business of national banks: Provided, that bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed money capital within the meaning of this section.
>
> "(c) In the case of a tax on or according to or measured by the net income of an association, the taxing state may, except in case of a tax on net income, in-

clude the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing state upon mercantile, manufacturing, and business corporations doing business within its limits: Provided, however, that a state which imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other states and also imposes a tax upon the income of individuals, may include in such individual income dividends from national banking associations located within the state on condition that it also includes dividends from domestic corporations and may likewise include dividends from national banking associations located without the state on condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations.

"(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

"2. The shares of any national banking association owned by nonresidents of any state shall be taxed by the taxing district or by the state where the association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such nonresident shareholders.

"3. Nothing herein shall be construed to exempt the real property of associations from taxation in any state or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

"4. The provisions of Section 5219 of the Revised Statutes of the United States as in force prior to March 25, 1926, shall not prevent the legalizing, ratifying, or confirming by the states of any tax heretofore paid, levied, or assessed upon the shares of national banks,

or the collecting thereof, to the extent that such tax would be valid under said section. (R. S. Sec. 5219; Mar. 4, 1923, c. 267, 42 Stat., 1499; Mar. 25, 1926, c. 88, 44 Stat., 223.)

"(R. S. Sec. 5219 from Act June 3, 1864, c. 106, Sec. 41, 13 Stat., 111; Act Feb. 10, 1868, c. 7, 15 Stat., 34.)"

The State of Ohio has elected to tax the shares of the stockholders, as provided by Statute, as follows:

> Section 5408 of the General Code of Ohio (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition): "Shares or Capital of Banks, Incorporated or Unincorporated. All the shares of the stockholders in an incorporated bank or banking association, located in this state, incorporated or organized under the laws of the state or of the United States, and all the shares of the stockholders in an unincorporated bank, located in this state, the capital stock of which is divided into shares held by the owners of such banks and the capital employed, or the property representing it in an unincorporated bank the capital stock of which is not divided into shares, located in this state, shall be listed at the true value in money, and taxed only in the city, ward, or village where such bank is located."

So that the net effect of Section 5219 of the Revised Statutes of the United States, as amended, and the election of the Legislature of Ohio to tax the shares of the shareholders leaves the law, with respect to taxation thereof in Ohio, in the same condition it was when the case of *Owensboro National Bank* vs. *Owensboro, supra,* was decided by the Supreme Court in 1899.

The Supreme Court of the United States has also held that:

> "1. Where the validity of a tax assessment by state officers is properly challenged and the matter comes before the Federal Supreme Court, that Court must determine the effect of the thing actually done. What

might have been done under the local statute is not controlling.

"2. A state tax assessed to a national bank, measured by the value of the bank's capital stock, surplus, undivided profits, and other personal property, is not equivalent to one upon the shareholders in respect of their shares, and such tax is, therefore, invalid under U. S. Revised Statutes, Section 5219 (Title 12, Section 548, U. S. Code) which only permits the state, when assessing taxes, to include national bank shares in the valuation of the personal property of the owner or holder."—First National Bank of Gulfport, Mississippi, *vs.* Adams, Revenue Agent, (1922), 258 U. S. 362, 66 Law. Ed. 661, 42 S. Ct. 323.

Section 5219 of the Revised Statutes of the United States, as hereinbefore quoted, has been amended since the decision in the case of *First National Bank of Gulfport, Mississippi,* vs. *Adams, Revenue Agent, supra,* but we believe in no way affecting the validity of the decision of the Supreme Court in said last cited case. However, the last previous decision of the Supreme Court of Ohio, in construing the Ohio Statutes with reference to the taxation of National Bank shares, held that:

"1. There is no authority in the statutes of the state nor of the United States for listing and valuing the shares in a national bank in the aggregate and placing such aggregate on the tax list in the name of the bank. Such shares, when listed and valued for taxation, are required to be placed on the proper tax list in the names of the respective owners."—Miller, Treasurer, *vs.* First National Bank, (1889), 46 O. S. 424.

And the issue raised by Appellant's contention that the Ohio Statutes here in question are repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States and to Section 5219 of the Revised Statutes of the United States has never been raised before in the

Supreme Court of the United States because such construction as the Supreme Court of Ohio has placed upon the Ohio Statutes in question—namely, Sections 5408 to 5414, inclusive, of the General Code of Ohio (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition) and Sections 5672 and 5673 of the General Code of Ohio (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930, or 102 Ohio Laws 91)—has never heretofore been placed upon such statutes and, consequently the question here raised has never been decided by the Supreme Court of the United States.

*G.*

**Stage of Proceedings and Manner in Which Federal Questions Were Raised.**

The Federal questions were raised by the original petitions filed in each of the three cases in the Common Pleas Court of Belmont County, Ohio, the Court of first instance (R., pages 191, 192, 196, 200, 201, 208, 209, 210, 214, 217, 218, 223, 226, 228, 239), which cases were consolidated by that Court into one action and such Federal questions were carried through various amended petitions (R., pages 209, 219, 228) to the Third Amended Petition upon which the case was finally heard by said Common Pleas Court (R., page 32) and in which Third Amended Petition it is alleged:

> "7. By reason of the foregoing the pretended assessment of said taxes against plaintiff by said auditor of Belmont County, Ohio, and threatened collection thereof from plaintiff by said treasurer of Belmont County, Ohio, are, and at all times herein stated were, contrary to law and in violation of plaintiff's legal and constitutional rights in the following respects, to-wit:
>
> "(a) There is no Statute of Ohio nor of the United States of America authorizing or permitting the Audi-

tor to make said assessments of taxes against Plaintiff.

"(b) . . . .

"(c) The statutes of Ohio, under authority of which said Auditor and Treasurer pretend to have assessed said taxes against Plaintiff and to have the right to collect the same from Plaintiff, respectively, are in violation of Section 5219 of the Revised Statutes of the United States of America, now Section 548 of Title 12 of the United States Code, and also in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States of America . . ."—(R., pages 10 and 11).

Issue was joined on these allegations by the Fourth Defense of the Answer of the County Treasurer and the County Auditor, in which it was stated that:

"Each of said Defendants . . . . denies that the said Auditor ever attempted to or did levy or assess a tax in any amount or at any time against Plaintiff for either of the years stated in said Third Amended Petition upon any property of Plaintiff other than its real estate; . . . . denies that said Auditor did not at any time list or assess against the owners of the shares of the capital stock of said corporation for said years a tax or taxes upon their respective shares; denies that said Auditor did not place upon said Tax Duplicates for said years the values of the shares of capital stock of Plaintiff in the names of the respective owners of such shares of stock; denies that said Auditor attempted to or did impose against said Plaintiff any amount of taxes or penalty; denies that the pretended assessment of said taxes by said Auditor of Belmont County, Ohio, are or were contrary to law or in violation of any right of Plaintiff . . . ."—(R., pages 18 and 19).

The said Federal questions raised by the pleadings were also urged by the Bank by oral argument and in briefs filed in said Court of Common Pleas. In the Court of Ap-

peals of Belmont County, Ohio, the case was heard upon the same pleadings as in the Court of Common Pleas and the Federal questions were thus again raised by the pleadings and the Bank urged the same in oral argument (R., pages 53 and 69) and by brief submitted in said Court of Appeals.

In the Supreme Court of Ohio the case was heard on said pleadings and the Record, made in the two lower courts, where the Federal questions involved were urged both in oral argument and in printed briefs.

*H.*

**The Manner in Which Questions Involved Were Passed Upon by the Court.**

Said Court of Common Pleas held that the taxes in question:

> "were not and are not imposed upon The Second National Bank of St. Clairsville, Ohio; that said taxes were and are imposed in the aggregate solely upon the shares of stock in said banking association; that said taxes are a lien on said shares; that said lien on said shares continues until said taxes are paid; that neither of said banking association nor its shareholders is personally liable for the payment of any portion of said taxes; that said shares of stock alone are liable for the payment of said taxes to the extent of the value of said shares and of any distribution on account thereof; and that said taxes are due and payable but are not collectible unless and until the same are apportioned to the several shares and are entered on the appropriate tax lists and tax duplicates in the names of the several holders of said shares.
>
> "It is, therefore, ordered, adjudged and decreed that the temporary injunction heretofore granted with respect to said taxes in actions numbered 31259, 31804 and 32732, heretofore consolidated with and under the

number of this action, be and the same hereby is made perpetual so far as to prevent Defendants Auditor, Treasurer and Recorder, and their successors in office respectively, or either of them, (1) from collecting or attempting to collect the same from the Plaintiff herein in its corporate capacity or from the stockholders of Plaintiff corporation as a personal liability of either said corporation or said shareholders and (2) from collecting or attempting to collect the same by enforcing the lien of said taxes on said shares unless and until the aggregate amount of taxes imposed upon said shares is apportioned to the several shares and are entered on the appropriate tax lists and tax duplicates in the names of the several holders of said shares, respectively.

"It is further ordered, considered and adjudged that the pretended lien against the real estate of Plaintiff, now appearing of record in the office of the County Recorder for and on account of taxes listed on the tax list and tax duplicate for each of the years 1928, 1929 and 1930, be and the same hereby are cancelled of record * * *"—(R., pages 33 and 34).

Said Court of Appeals held:

"4. That the said Auditor of Belmont County, Ohio, assessed taxes against Plaintiff, The Second National Bank of St. Clairsville, Ohio, upon the amounts of its capital, surplus and undivided profits, after deducting therefrom the value of all the real estate owned by Plaintiff, as exhibited by said reports hereinbefore mentioned, as follows:

| | |
|---|---|
| For the year 1928 | $6,284.32 |
| For the year 1929 | 7,030.52 |
| For the year 1930 | 8,038.72 |

which amounts were, thereafter, by said Auditor of Belmont County, Ohio, placed against Plaintiff, The Second National Bank of St. Clairsville, Ohio, upon said Auditor's Tax Lists and the Tax Duplicates of said county for the said years 1928, 1929 and 1930,

respectively, were certified and transmitted by said Auditor to said Treasurer for collection from Plaintiff but Plaintiff has not paid any part of said taxes for said years and said Auditor of Belmont County did not, at any time list or assess against the owners of the shares of capital stock of Plaintiff, for any of said years, a tax or taxes upon their respective shares in any amount or amounts whatsoever and did not, at any time, place on said Tax Lists or Tax Duplicates for said years the values of the shares of the capital stock of Plaintiff in the names of the respective owners of such shares of stock; and that said Auditor assessed a penalty against Plaintiff, The Second National Bank of St. Clairsville, Ohio, when said taxes became delinquent in each of said years, of ten per cent of the amount of said tax for each of said years and added the same to the Auditor's respective Tax Lists and the Treasurer's respective Tax Duplicates in the name of and against said Plaintiff, The Second National Bank of St. Clairsville, Ohio;

"5. That said Auditor of Belmont County, Ohio, filed said assessments of taxes and penalties against Plaintiff, The Second National Bank of St. Clairsville, Ohio, in the office of the Recorder of Belmont County, Ohio, for and thereby obtained liens against the real estate of Plaintiff, The Second National Bank of St. Clairsville, Ohio, which filing constituted a cloud on the title of all of the real estate standing of record in the name of Plaintiff, The Second National Bank of St. Clairsville, Ohio, to Plaintiff's irreparable damage and against which Plaintiff has no adequate remedy at law.

"6. That said Defendants will, unless restrained by order of Court, take legal action against Plaintiff to enforce the collection of such taxes and penalties and, against such acts and threatened acts of Defendants, Plaintiff has no adequate remedy at law and will suffer irreparable injury thereby; that said assessments of taxes and penalties against Plaintiff, The Second National Bank of St. Clairsville, and the threatened col-

lection thereof from Plaintiff, were and are contrary to law; and that said taxes and penalties thereon so assessed against Plaintiff are illegal and void and the liens of said taxes and penalties filed in the office of the Recorder of Belmont County, Ohio, are illegal and void.

"It is, therefore, ordered, adjudged and decreed that the Defendants, and their respective successors in office, be and they are hereby forever enjoined from collecting or attempting to collect from Plaintiff said taxes and penalties; that the pretended liens against the real estate of Plaintiff, now appearing of record in the office of the Recorder of Belmont County, Ohio, for and on account of said pretended taxes and penalties, be and the same are hereby ordered cancelled of record * * *"—(R., pages 46, 47 and 48).

The Supreme Court of Ohio held that:

"1. Under the provisions of Section 5408, General Code, as in effect prior to January 1, 1931, all the shares of the stockholders in an incorporated bank or banking association located in this state, incorporated or organized under the laws of this state or the United States, are required to be listed for taxation at their true value in money.

"2. The provisions of Section 5672, General Code, as in effect prior to January 1, 1931, making the taxes assessed on shares of stock in a bank or banking association a lien on such shares until paid, and imposing upon such bank or banking association the duty to collect the taxes due upon its shares of stock from the owners thereof and pay the same to the treasurer of the county in which such bank or banking association is located, and imposing upon any bank or banking association failing to pay such taxes a liability by way of penalty for the gross amount of taxes due from all the owners of the shares of stock, do not impose a tax on the bank and are not violative of the provisions of Section 548 of Title 12 of the Code of Laws of the

United States prescribing the manner in which taxes affecting national banks may be levied and assessed.

"3. The placing of the levy of taxes on the tax duplicate against the bank instead of the respective owners of the shares of stock does not constitute the same a lien on the real estate of the bank.

"4. The apportionment of the aggregate amount of taxes due on bank shares among the respective owners thereof is not a prerequisite to the enforcement of the liability of a bank to collect the taxes due upon its shares of stock and pay same to the treasurer of the county by the provisions of Section 5672, General Code."—142 O. S. 6.

*I.*

**Excerpts From the Record Bringing the Cause Within the Statute Conferring Jurisdiction on the Supreme Court.**

The following excerpts from the Record show that this cause is within the Statute conferring jurisdiction on the Supreme Court:

*Pleadings*

*Third Amended Petition* (Excerpts):

"• • •

"3. Plaintiff delivered detailed reports, in duplicate, of Plaintiff's resources and liabilities as of the close of business on the Wednesday next preceding the second Monday in May in each of the years hereinafter set forth, together with full statements of the names and residences of plaintiff's stockholders and the number of shares of the capital stock of plaintiff held by each and the par value of each share to the auditor of Belmont County, Ohio, on the dates hereinafter set forth, as required by law, which reports showed the capital stock, surplus and undivided profits of plaintiff, after deducting the value of the real estate owned by plain-

tiff, to be the amount set forth opposite the respective dates of filing said reports with the county auditor as follows, to-wit:

"* * *

| | |
|---|---|
| May 14, 1928 | $253,400.00 |
| May 10, 1929 | 260,390.00 |
| May 13, 1930 | 254,390.00 |

and plaintiff at all times kept in its office, where its business was transacted, a full and correct list of the names and residences of plaintiff's stockholders and the number of shares held by each, which list at all times during business hours was open to the inspection of said auditor and said treasurer.

"4. The said auditor of Belmont County attempted to impose upon plaintiff, by levying and assessing against plaintiff for the years * * * 1928, 1929 and 1930, upon the amount of its capital, surplus and undivided profits, after deducting therefrom the value of all the real estate owned by plaintiff, as exhibited by said reports and hereinabove set forth, taxes for said years as follows:

"* * *

| | |
|---|---|
| For the year 1928 | $6,284.32 |
| For the year 1929 | 7,030.52 |
| For the year 1930 | 8,038.72 |

which amounts were thereafter, by said auditor of Belmont County, Ohio, placed against plaintiff upon the tax duplicates of said county for the respective years * * * 1928, 1929 and 1930, and certified and transmitted to the treasurer of Belmont county, Ohio, for collection by him from the plaintiff but plaintiff has not paid any part of said taxes * * *; and said auditor of Belmont County, Ohio, did not at any time list nor assess against the owners of the shares of capital stock of plaintiff for any of said years 1926 to 1930, inclusive, a tax or taxes upon their respective shares in any amount or amounts whatsoever, and did not at any time place on said tax duplicates for said years the values

of the shares of capital stock of plaintiff in the names of the respective owners of such shares of stock (R., page 4).

"Defendants filed said pretended assessments and pretended levy in the office of the recorder of Belmont County for a lien against the real property, which filing constituted a cloud on the title of all the real estate standing of record in the name of plaintiff at the time, to plaintiff's irreparable damage, against which it has no adequate remedy at law.

"* * *

"7. By reason of the foregoing the pretended assessment of said taxes against plaintiff by said auditor of Belmont County, Ohio, and threatened collection thereof from plaintiff by said treasurer of Belmont County, Ohio, are, and at all times herein stated were, contrary to law and in violation of plaintiff's legal and constitutional rights in the following respects, to-wit:

"(a) There is no statute of Ohio nor of the United States of America authorizing or permitting the auditor to make said assessments of taxes against plaintiff.

"(b) * * *

"(c) The statutes of Ohio under authority of which said auditor and treasurer pretend to have assessed said taxes against plaintiff and to have the right to collect the same from plaintiff, respectively, are in violation of Section 5219 of the Revised Statutes of the United States of America now Section 548 of Title 12 of the United States Code and also in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States of America * * *.

"8. The defendants and each of them will, unless restrained by order of this court, place penalties upon plaintiff for its failure to pay said taxes at the times fixed by law for such payment and will take legal action against plaintiff to enforce the collection of such taxes

and penalties from plaintiff and against such acts and threatened acts of defendants plaintiff has no adequate remedy at law and will suffer irreparable injury thereby. * * *

"Wherefore plaintiff prays that all of said pretended taxes levied and assessed against the plaintiff for the years aforesaid be declared, adjudged and decreed to be * * * invalid, illegal and void; that any purported lien upon the property of plaintiff by reason thereof or arising therefrom be decreed to be void and of no effect; that defendants and their respective successors in office be enjoined from collecting or attempting to collect from plaintiff the said taxes levied and assessed during the years 1928, 1929 and 1930; that pending the determination of this action a temporary restraining order be issued forbiding any action upon the part of defendants in collecting said taxes or assessing any penalties for the failure to pay said taxes and that upon final hearing said restraining order be made permanent and that plaintiff have such other and further relief as is proper."—(R., pages 10, 11, 12 and 13).

"Fourth Defense of Defendants' Answer to Third Amended Petition.

"17. Each of said Defendants * * * denies that the said Auditor ever attempted to or did levy or assess a tax in any amount or at any time against Plaintiff for either of the years stated in said Third Amended Petition upon any property of Plaintiff other than its real estate; denies that the taxes referred to in said Third Amended Petition are other than as imposed by law on shares of Plaintiff's capital stock in the amount of their true value in money, less the value of the real estate included in its said statement of resources as it stands upon the tax duplicate relating to real estate; denies that said Auditor did not at any time list or assess against the owners of the shares of the capital stock of said corporation for said years a tax or taxes upon their respective shares; denies that said Auditor did not place upon said tax duplicate for said years the

values of the shares of capital stock of Plaintiff in the names of the respective owners of such shares of stock; denies that said Auditor attempted to or did impose against said Plaintiff any amount of taxes or penalty; denies that the pretended assessment of said taxes by said Auditor of Belmont County, Ohio, are or were contrary to law or in violation of any right of Plaintiff * * *"—(R., pages 18 and 19).

*Cross Examination of E. E. Taylor, present Auditor of Belmont County, Ohio,* (Excepts):

"Q. Your name is E. E. Taylor?

"A. Yes, sir.

"Q. And you are the county auditor of Belmont County?

"A. I am. (R., page 100.)

* * * * * * *

"Q. Have you all the records here, Mr. Taylor?

"A. All that I know of.

"Q. Now, those records consist of what?

"A. The annual statement of Second National Bank of St. Clairsville, Belmont County, Ohio, for the years 1926, '27, '28, '29 and '30, together with the auditor's tax list. (R., page 101.)

"Q. Now, Mr. Taylor, I hand you the papers which you have just handed me and which you have identified as annual statements of the bank for the years in question in this case and I will ask you to identify those papers by the mark that is on them and tell us what year each refers to.

"A. PX1 represents the 1926 annual statement of The Second National Bank of St. Clairsville, Belmont County, Ohio, filed May 10, 1926. PX2 represents the annual statement for the year 1927 of Second National Bank of St. Clairsville.

"Q. It is the same bank isn't it? You don't need to repeat the name of the bank.

"A. Filed May 9, 1927. And PX3 is annual statement filed May 14, 1928. PX4 is the annual statement

filed on May 10, 1929. And PX5 is the annual statement for 1930, filed on May 13, 1930. (R., page 102.)

"Earl Lewis: I offer them in evidence if the Court please. Offer them separately.

"Court: They may be received separately." (R., page 103.)

Copies of that part of exhibits marked PX3, PX4 and PX5 showing detail of resources and liabilities of the Bank for the years 1928, 1929 and 1930, respectively, as contained in said annual statements filed with the County Auditor, are set forth in "Appendix D," page 63, et seq., hereof.

"Q. All right. I will ask you now to turn to the auditor's tax list book for the year 1928, and to the entry that we are concerned with. Now what book do you have?

"A. I have tax book, personal, 1928, Bellaire to Powhatan Point.

"Q. All right.

"A. Auditor's tax list for taxes assessed on personal property in St. Clairsville village, Belmont County, Ohio, for the year 1928.

"Q. That is the heading of the page, is it?

"A. Yes, sir. Line 3.

"Q. All right.

"A. Receipt number, blank. Card number, blank. Owner's name, Second National Bank. Address, blank. Value as equalized by assessor $253,400. Value as equalized by board of revision on complaints, blank. Value as equalized by tax commission, blank. Road tax, blank. One-half tax 1928, blank. Delinquent tax 1927, blank. Total tax due December, 1928, $3,142.16. Remarks, blank. Total tax 1928 and delinquent tax 1927, $6,284.32. Remarks, blank. Tax of December, 1928, not paid, $3,142.16. Penalty on December tax, blank. Total tax and penalty due June, 1929, $6,284.32. Remarks, blank. Line 4. Pardon me. Line 3.

"Q. That is the listing to which your attention was called for the year twenty——

"A. Eight.

"Q. Eight.

"A. It is. (R., page 106.)

"Q. Is there any other listing of property for taxes based upon the annual statement of the bank for that year?

"A. Not to my knowledge.

"Q. All right. I ask you to turn to the auditor's tax list for the bank in question in this case for the year 1929. First, tell us what book you have.

"A. Tax book, personal property, 1929, Bellaire to Powhatan Point.

"Q. I will ask you to turn to the proper entry and give us the entries of the property in question in this case, giving us the heading of the page first.

"A. Auditor's tax list, taxes assessed on personal property, St. Clairsville village, Belmont County, Ohio, for the year 1929, on line 4. This is headed Banks. Receipt number, blank. Card number, blank. Owner's name, Second National Bank. Address, blank. Value as equalized by assessor, $260,390. Value as equalized by board of revision on complaints, blank. Value as equalized by tax commission, blank. Road tax, blank. One-half tax 1929, blank. Delinquent tax 1928, blank. Tax due December, 1929, $3,515.26. Remarks, blank. Total tax 1929 and delinquent 1928, $7,030.52. Remarks, blank. Tax of December, 1929, not paid $3,515.26. Penalty on December tax, $703.05. Total tax and penalty due June, 1930, $7,733.57. Remarks, blank. Line 4.

"Q. Now, Mr. Taylor, is there any other entry or listing of any property for taxation for the year 1929 based upon the annual report or statement of the bank in question?

"A. Not to my knowledge.

"Q. All right. I ask you now to turn to your tax list for the year 1930, based upon the return of the bank in question for that year. (R., page 107.)

"A. Tax book, personal, 1930, Bellaire to Powhatan Point.

"Q. Tell us what the entry is in that book.

"A. Auditor's tax list, taxes assessed on personal property in St. Clairsville village, Belmont County, Ohio, for the year 1930, under the heading of banks. Line 4. Receipt number, blank. Card number, blank. Owner's name, Second National Bank. Address, blank. Value as equalized by assessor, $254,390. Value as equalized by board of revision on complaints, blank. Value as equalized by tax commission, blank. Road tax, blank. One-half tax 1930, $4,019.36. Delinquent tax 1929, blank. Total tax due December, 1930, $4,-019.36. Remarks, blank. Total tax 1930 and delinquent tax 1929, $8,038.72. Remarks, blank. December tax, 1930, not paid, $4,019.36. Penalty on December tax, $803.87. Total tax and penalty due June, 1931, $8,-842.59. Remarks, blank. Line 4.

* * * * * * *

"Q. All right. Now, Mr. Taylor, is there any other listing of property for taxation in anybody's name for the year 1930, based upon the annual statement of the Second National Bank of St. Clairsville for that year, that you know of, in your records?

"A. Not to my knowledge." (R., page 108.)

"Earl Lewis: Now, if the Court please, I offer in evidence the Auditor's—I offer in evidence the matter read by the Auditor from the various tax list books, personal tax list books, for the years 1926 to 1930, inclusive, and I offer them as exhibits numbered PX6 to PX10, inclusive.

"Mr. Lancione: I object.

"Court: Overruled. They may be received.

"Mr. Lancione: Except.

"Earl Lewis: And I ask permission to substitute a copy which we have already prepared.

"Court: You may do so. (R., page 109.)

"Q. While we are waiting I might ask this, Mr. Taylor: The taxes which these records of your tax list for the years in question show as having been assessed in the name of The Second National Bank of St. Clairs-

ville were arrived at by multiplying the valuation, the ultimate valuation by the tax rate for that particular year in question in the village of St. Clairsville, Ohio, is that correct? (R., page 115.)

* * * * * * *

"Court: All right, you may answer that.
"A. Yes, sir.

"Mr. Sedgwick: Exception.

"Q. That is the way the tax was arrived at?
"A. Sure." (R., page 116.)

*Cross-examination of Homer J. Findley, present Treasurer of Belmont County, Ohio* (Excerpts):

"Q. Your name is Homer J. Findley?
"A. That's right.
"Q. You are the County Treasurer of Belmont County?
"A. That's right. (R., page 117.)
"Q. Mr. Findley, do you have the Auditor's or Treasurer's Tax Duplicates here for the years 1926 to 1930, inclusive?
"A. I do.
"Q. And on those duplicates, do they show the taxes levied in the name of The Second National Bank of St. Clairsville?
"Q. For those years?
"A. (Witness indicates 'Yes') (R., page 118).

* * * * * * *

"Q. Now I will ask you to turn to the tax duplicate record for the year 1928 and identify the book and read the headings of the column, the heading of the page, the line and the entries that you find there.
"A. 1928. Richland township. Treasurer's duplicate of taxes assessed on personal property in St. Clairsville village, Belmont County, Ohio, for the year 1928. Page 141. Line number 3. Under heading receipt number, number being 4104. Card number, blank.

Owner's name, Second National Bank. Address, not given, blank. Listed as banks. Value as equalized by assessor, $253,400. Value as equalized by board of revision on complaints, blank. Value as equalized by Tax Commission, blank. Road tax, blank. One-half tax 1928, blank. Delinquent tax 1927, blank. Total tax due December, 1928, $3,142.16. Remarks, blank. Total tax 1928 and delinquent tax 1927, $6,284.32. Remarks, blank. Total tax of December, 1928, not paid, $3,142.16. Penalty on December tax, blank. Total tax and penalty due June, 1929, $6,284.32. Remarks, blank. Line 3. (R. page 122.)

"Q. Now, Mr. Findley, I will ask you to turn to the tax duplicate record for the year 1929 and identify the book, and turn to the proper entry there showing the tax assessed in the name of Second National Bank of St. Clairsville.

"A. Richland Township, 1929.

"Q. Give us what is shown.

"A. Page 141. Treasurer's duplicate of taxes assessed on personal property in St. Clairsville village, Belmont County, Ohio, for the year of 1929. Line number 4. Receipt number 4085. Card number blank. Owner's name, The Second National Bank. Address, blank. Listed under banks. Value as equalized by assessor, $260,390. Value as equalized by board of revision on complaints, blank. Value as equalized by Tax Commission, blank. Road tax, blank. One-half tax 1929, blank. Delinquent tax of 1928, blank. Total tax due December, 1929, $3,515.26. Under heading remarks, delinquent. Total tax 1929 and delinquent tax 1928, $7,030.52. Remarks, blank. Tax of December, 1929, not paid, $3,515.26. Penalty on December tax, $703.05. Total tax and penalty due June, 1930, $7,733.57. Under remarks, delinquent. Line 4.

"Q. Now, Mr. Findley, I will ask you to turn to your tax duplicate record for the year 1930 showing the listing of property in the name of Second National Bank, taxes, and identify the record and give us the page and headings and the entries that appear therein in the name of Second National Bank.

"A. Richland. 1930. Page 144. Treasurer's duplicate of taxes assessed on personal property in St. Clairsville village, Belmont County, Ohio, for the year of 1930. Line number 4. Receipt number 4060. Card number, blank. Owner's name, The Second National Bank—The Second National. Address, blank. (R., page 123.)

"Roy Lewis: Is 'Bank' not on it?

"A. No. Address, blank. And listed under the heading of banks. Value as equalized by assessor, $254,390. Value as equalized by board of revision on complaints, blank. Value as equalized by Tax Commission, blank. Road tax, blank. One-half tax 1930, $4,019.36. Delinquent tax 1929, blank. Total tax due December, 1930, $4,019.36. Remarks, delinquent. Total tax 1930 and delinquent tax 1929, $8,038.72. Remarks, blank. Tax of December, 1930, not paid, $4,019.36. Penalty on December tax, $803.87. Total tax and penalty due June, 1931, $8,842.59. Remarks, delinquent. Carried on margin, line 4. Carried on the margin, $8,842.59.

"Q. Now, Mr. Findley, I notice that some of the—for some of those years, 1928, 1929 and 1930, your tax lists show that there are delinquent taxes, delinquent personal tax in the name of the Second National Bank of St. Clairsville. Is that correct?

"A. That's right.

"Q. You have a delinquent tax record, don't you?

"A. Yes, we do.

"Q. And you have that with you here in court?

"A. That's right.

"Q. Now I will ask you to turn to the delinquent tax record for the year 1927, 1928, and tell us what your entry is there as to the total delinquent taxes, delinquent personal taxes, in the name of Second National Bank of St. Clairsville.

"Earl Lewis: If the court please, while he is looking at the record, I will offer in evidence the treasurer's tax duplicate entries that have just been read by the treasurer for the years 1926 to 1930, inclusive, and I offer them separately. (R., page 124.)

"Court: They may be received.

"Mr. Lacione: I object.

"Court: They may be received.

"Mr. Lancione: Exception.

"Earl Lewis: They will be numbered PX11 to 15, inclusive, and I will ask that we be permitted to substitute copies which we have here and that the copies should bear the same respective numbers.

"Court: That may be done."—(R., page 125.)

Copies of exhibits marked PX13, PX14 and PX15 are set out in full in "Appendix E," page 78, et seq., hereof.

"Q. What is the number of the page?

"A. Number 76.

"Q. And what is the heading of that page?

"A. List of taxes of personal property, Richland township, remaining unpaid at August settlement 19—, Belmont county, Ohio.

"Q. And are the lines numbered on which this—is the line numbered on which this entry in the name of Second National Bank is made?

"A. (Witness examines book.)

"Q. What is the line number?

"A. 446.

"Q. Now read us the column heading and the proper entries or the enry that appears in that column opposite the name of the bank.

"A. Name, Second National Bank. Receipt number, —I assume that is the number, I am not sure about that,—number 446. (R., page 125.)

"Q. There is a number 446 there.

"A. Name, Second National Bank. Year, 1928.

"Q. All right. Go ahead.

"A. Valuation, Second National Bank, is $253,400. Total unpaid, $6,284.32. Penalty, $628.43. Total, $6,912.75.

* * * * * * *

"Q. Now, Mr. Findley, that is the delinquent tax list for the year 1928, is it?

"A. Yes, sir.

"Q. And that is the listing of property, personal property, of the Second National Bank?

"A. Yes, sir. That's right.

* * * * * * *

"Q. All right, I will ask you to turn to the delinquent tax list for the year 1929 in the name of Second National Bank, identify the record and give us the page on which the entry appears, column headings and the appropriate entries.

"A. Auditor's duplicate, delinquent personal, Belmont county. Volume number 7. Page number 54. List of taxes on personal property, Richland Township, (R., page 126) St. Clairsville village, remaining unpaid August settlement 19 blank, Belmont County, Ohio. This number is 002, I suppose. The name, Second National Bank. The year, 1929. Valuation, $260,390. Listed under banks. Total unpaid, $7,030.52. Penalty, $703.05. Total $7,733.57. Date of payment, blank.

* * * * * * *

"Q. All right. Now, that is the record of the delinquent taxes assessed in the name of Second National Bank of St. Clairsville for the year 1929, is it?

"A. Yes, sir.

"Q. I will ask you to turn to the record of the delinquent taxes in the name of Second National Bank for the year 1930. First, what is the record in which you find it? Is that the same record?

"A. Delinquent personal, Belmont County, volume number 7.

"Q. Give us the heading, please, and then the appropriate entries in the name of the bank.

"A. Page 10. List of taxes on personal property, Richland township, remaining unpaid at August settlement 19 blank, Belmont County, Ohio. Receipt number 5536. Name, The Second National Bank. Year, 1930. Valuation, $254,390. Total unpaid, $8,842.59. Penalty, blank, Total, $8,842.59. Date of payment, blank. * * *"—(R., page 127).

*Journal Entry of Court of Common Pleas of Belmont County, Ohio, November 25, 1940,* (Excerpts):

"This cause was heard on the third amended petition of plaintiff, the answer of defendants and the evidence, and was submitted to the court. * * *

"On further consideration of said pleadings and the evidence, the court find, on the issues joined with respect to the first cause of action alleged in said third amended petition, as follows: that the taxes mentioned and described therein, as they appear on the records in the office of defendant auditor and of defendant treasurer for each of the years 1928, 1929 and 1930, were not and are not imposed upon The Second National Bank of St. Clairsville, Ohio; that said taxes were and are imposed in the aggregate solely upon the shares of stock in said banking association; that said taxes are a lien on said shares; that said lien on said shares continues until said taxes are paid; that neither of said banking association nor its shareholders is personally liable for the payment of any portion of said taxes; that said shares of stock alone are liable for the payment of said taxes to the extent of the value of said shares and of any distribution on account thereof; and that said taxes are due and payable but are not collectible unless and until the same are apportioned to the several shares and are entered on the appropriate tax lists and tax duplicates in the names of the several holders of said shares.

"It is therefore ordered, adjudged and decreed that the temporary injunction heretofore granted with respect to said taxes in actions numbered 31259, 31804 and 32732, heretofore consolidated with and under the number of this action be, and the same hereby is, made perpetual, so far as to prevent defendants auditor, treasurer and recorder and their successors in office, respectively, or either of them, (1) from collecting or attempting to collect the same from plaintiff herein, in its corporate capacity, or from the stockholders of plaintiff corporation, as a personal liability of either

said corporation or said shareholders; and (2) from collecting or attempting to collect the same by enforcing the lien of said taxes on said shares, unless and until the aggregate amount of taxes imposed upon said shares is apportioned to the several shares and are entered on the appropriate tax lists and tax duplicates in the names of the several holders of said shares, respectively.

"It is further ordered, considered and adjudged that the pretended lien against the real estate of plaintiff now appearing of record in the office of the county recorder, for and on account of taxes listed on the tax list and tax duplicate for each of the years 1928, 1929 and 1930, be, and the same hereby are, canceled of record, and that the recorder be, and he is ordered to note on the margin of each and all appropriate records in his office the cancellation thereof by, and the date of, the entry hereof. * * *"—(R., pages 32, 33 and 34)

*Journal Entry of Court of Appeals of Belmont County, Ohio, November Term, 1941, (May 4),* (Excerpts):

"This cause now coming on for hearing upon appeal on questions of law and fact upon the third amended petition and the answer thereto, and the reply, the transcript of docket and journal entries, and the evidence, and the arguments and briefs of counsel for the parties; and the court, being fully advised in the premises, finds in favor of plaintiff, The Second National Bank of St. Clairsville, Ohio, and against the defendants, the treasurer of Belmont County, Ohio, and the auditor of Belmont County, Ohio, on the first cause of action of the third amended petition, as follows:
* * *

"4. That the said auditor of Belmont County, Ohio, assessed taxes against plaintiff, The Second National Bank of St. Clairsville, Ohio, upon the amounts of its capital, surplus and undivided profits, after deducting therefrom the value of all the real estate owned by

plaintiff, as exhibited by said reports hereinbefore mentioned, as follows:

| | |
|---|---|
| "For the year 1928 | $6,280.32 |
| For the year 1929 | 7,030.52 |
| For the year 1930 | 8,038.72 |

which amounts were, thereafter, by said auditor of Belmont County, placed against plaintiff, The Second National Bank of St. Clairsville, Ohio, upon said auditor's tax list and the tax duplicates of said county for the said years 1928, 1929 and 1930 respectively were certified and transmitted by said auditor to said treasurer for collection from plaintiff, but plaintiff has not paid any part of said taxes, for said years and said auditor of Belmont County did not, at any time, list or assess against the owners of the shares of capital stock of plaintiff for any of said years a tax or taxes upon their respective shares in any amount or amounts whatsoever and did not, at any time, place on said tax lists or tax duplicates for said years the values of the shares of the capital stock of plaintiff in the names of the respective owners of such shares of stock; and that said auditor assessed a penalty against plaintiff, The Second National Bank of St. Clairsville, Ohio,

* * * * * * *

"6. That said defendants will, unless restrained by order of court, take legal action against plaintiff to enforce the collection of such taxes and penalties, and against such acts and threatened acts of defendants, plaintiff has no adequate remedy at law and will suffer irreparable injury thereby; that said assessments of taxes and penalties against plaintiff, The Second National Bank of St. Clairsville, Ohio, and the threatened collection thereof from plaintiff were and are contrary to law; and that said taxes and the penalties thereon so assessed against plaintiff are illegal and void and the liens for said taxes and penalties filed in the office of the recorder of Belmont County, Ohio, are illegal and void.

"It is, therefore, ordered, adjudged and decreed that the defendants and their respective successors in office, be and they are hereby forever enjoined from collecting or attempting to collect from plaintiff said taxes and penalties; that the pretended liens against the real estate of plaintiff, now appearing of record in the office of the recorder of Belmont County, Ohio, for and on account of said pretended taxes and penalties, be and the same are hereby ordered cancelled of record, and the clerk of this court is hereby ordered to issue his certificate to the said recorder of Belmont County, Ohio, releasing and discharging said taxes and penalties of record, and the same shall be entered on the personal tax lien record of said recorder of Belmont County, Ohio, to all of which defendants except. * * *"—(R., pages 44, 45, 46 and 47 and 48).

*Journal Entry of Supreme Court of Ohio, January Term, A. D. 1943, (June 30):*

"This cause came on to be heard upon the Transcript of the Record of the Court of Appeals of Belmont County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the judgment of the said Court of Appeals, insofar as said decree orders that the pretended liens against the real estate of the Appellee, now appearing of record in the office of the Recorder of Belmont County, Ohio, be cancelled of record and that the Clerk of the Court issue a certificate releasing and discharging said taxes and penalties of record against the real estate of Appellee and insofar as the Court renders judgment for Appellants on the Second Cause of Action herein be and the same hereby is affirmed and it is further ordered and adjudged by this Court that in all other respects the judgment of the said Court of Appeals be and the same hereby is reversed and final judgment rendered in favor of the Appellants for the reasons stated in the Opinion rendered in this case.

"It is further ordered and adjudged that Appellants herein recover from Appellee their costs expended in

this Court and in the Court of Appeals, taxed at $——.

"Ordered, that a special mandate be sent to the Court of Appeals of Belmont County to carry this judgment into execution."—(142 O. S. 6, R. page 228.)

*J.*

**Copy of Opinions On Rendition of Judgment.**

Opinions of the Court of Common Pleas, Court of Appeals and of the Supreme Court of Ohio are hereto attached, marked "Appendix A", "Appendix B", "Appendix C", respectively.

*K.*

**Cases Believed to Sustain the Jurisdiction.**

The following cases sustain the jurisdiction of the Supreme Court of the United States:

1. Jurisdiction to entertain an appeal from the decision of a state court on the ground that a state statute, as construed, is repugnant to the Constitution of the United States.

"In the exercise of the appellate jurisdiction of the Federal Supreme Court over state courts, the former court is bound by the construction of a state law adopted by its court of last resort. But the Federal Supreme Court, while bound by the construction of a state statute adopted by the state court of last resort, is not concluded by its reasoning, but must exercise independent judgment when called upon to determine the Federal question whether the action as construed and applied is repugnant to the restrictions of the Federal Constitution."—Ward *v.* Krinsky (1922) 259 U. S. 502, 42 S. Ct. 529, 66 Law. Ed. 1033, 28 A. L. R. 1207.

"Where the validity of a statute of California, as construed by the California courts, was drawn in ques-

tion on the ground of its being repugnant to the Constitution of the United States, a judgment of the Supreme Court of Calfornia was properly before the United States Supreme Court on Appeal."—Standard Oil Co. of California *v.* Johnson (1942), 62 S. Ct. 1168, 86 Law. Ed. 1611, reversing 119 P. 2d 329.

"The United States Supreme Court in passing on Constitutional questions regards substance and the statute attacked must be tested by its operation and effect."—Near *v.* The State of Minnesota (1931), 51 S. Ct. 625, 283 U. S. 697, 75 Law. Ed. 1357.

Smith *v.* Cahoon, 283 U. S. 553.

Aero Mayflower T. Co. *v.* Georgia Public Service Commission, 295 U. S. 285.

Hartford Steam Boiler Co. *v.* Harrison, Insurance Commissioner, 301 U. S. 458.

2. Jurisdiction to entertain an appeal from the decision of a state court on the ground that a state statute, as construed, is repugnant to a statute of the United States.

"The United States Supreme Court had jurisdiction of writ of error to review suit in the state court where the validity of a state statute providing for a tax on national bank shares is drawn in question as being repugnant to Section 548 of Title 12, United States Code."—First National Bank of Guthrie Center *v.* Anderson (1926), 46 S. Ct. 135, 269 U. S. 341, 70 Law. Ed. 295.

Northern Pacific Ry. Co. *v.* Washington, 222 U. S. 370.

Erie Ry. Co. *v.* New York, 233 U. S. 671.

Pennsylvania R. R. Co. *v.* Public Service Commission, 250 U. S. 566.

Napier *v.* Atlantic Coast Line Ry. Co., 272 U. S. 605.

Oregon and Washington R. R. and N. Co. *v.* Washington, 270 U. S. 87.

Missouri R. R. Co. *v.* Porter, 273 U. S. 341.

Characterization of a tax by a state court is not binding where a Federal right is concerned.—Carpenter *v.* Shaw, 280 U. S. 363, 74 Law. Ed. 478, 50 S. Ct. 121.

Georgia R. and Electric Co. *v.* Decatur, 295 U. S. 165, 79 Law. Ed. 1365, 55 S. Ct. 701.

Roe *v.* Kansas, 278 U. S. 191, 73 Law. Ed. 259, 49 S. Ct. 160.

Appeal may be had to the Supreme Court of the United States where a state statute, as construed and applied to a particular transaction, is repugnant to the Constitution or laws of the United States.—Dahnke-Walker Co. *v.* Bondurant (1921), 257 U. S. 282, 42 S. Ct. 106, 66 Law. Ed. 239.

Cudahy Co. *v.* Parramore (1923), 263 U. S. 418 at 422, 44 S. Ct. 153, 68 Law. Ed. 366.

Snyder *v.* Massachusetts (1934), 291 U. S. 97 at 115, 54 S. Ct. 330, 78 Law. Ed. 674.

N. C. and St. L. R. Co. *v.* Walters (1935), 294 U. S. 405 at 415, 55 S. Ct. 486, 79 Law. Ed. 949.

Doty *v.* Love (1935), 295 U. S. 64 at 71, 55 S. Ct. 558, 79 Law. Ed. 1303.

Appellate jurisdiction of the United States Supreme Court has been invoked and exercised for the protection of a federal claim of right under the statutes of the United States such as the National Banking Law.—McCormick *v.* Market Bank (1897), 165 U. S. 538, 17 S. Ct. 433, 41 Law. Ed. 817.

Seabury *v.* Green (1935), 294 U. S. 165, 55 S. Ct. 373, 79 Law. Ed. 834.

Therefore, the Petitioner, The Second National Bank of St. Clairsville, Ohio, respectfully submits that the Supreme Court of the United States has jurisdiction of this appeal

by virtue of Section 344(a) and (b) of Title 28 of the United States Code.

Respectfully submitted,

THORNBURG & LEWIS,
GEORGE THORNBURG,
EARL R. LEWIS,
*Attorneys for The Second National Bank of St. Clairsville, Ohio, Petitioner, and Appellant in the Supreme Court of the United States.*
*All of St. Clairsville, Ohio.*

## APPENDIX "A".

### Opinion—Common Pleas Court.

(September 3, 1940.)

MOUGEY, *J.*:

Statement of Facts

The hearings in the above entitled cases were held by the court in the order of the styling above; and the three above styled cases are each indicative of certain classes of cases pending in the Court of Common Pleas of Belmont County.

Class No. 1, The First National Bank of St. Clairsville, is a national bank, at the present time in the hands of a trustee for liquidation, and has paid its depositors in full and has on hand a balance payable for stockholders. Cause No. 32737, Bridgeport National Bank, is also a national bank, at the present time in the hands of a trustee for litigation, and has paid 96½ per cent of its depositors and has a balance in the hands of the trustee.

Class No. 2, The Second National Bank of St. Clairsville, is a national bank, was never closed except for the bank holiday, and is now an open bank continuing business. The First National Bank of Barnesville, Cause No. 32711, and The Community National Bank of Flushing, No. 32755, are the same as the Second National Bank of St. Clairsville.

Class No. 3, The Union Savings Bank of Bellaire, is a state bank, never was closed except for the bank holiday, and is now an open continuing bank.

In all of these cases it appears that returns were made by the cashiers of the respective banks to the taxing authorities of Belmont County, as required by Sec. 5411 General Code, and also in accordance with Sec. 5410 General Code, lists were kept in the respective banks of the names and residences of the stockholders therein and number of shares held by each. It also appears that in all of these cases taxes in the aggregate were levied and assessed on the personal property tax duplicates of Belmont County for the years 1926 to 1930, inclusive, based upon the returns made by the respective cashiers, and the listing on the tax dupli-

cate was made in the name of the respective bank. All of the said banks paid the 1926 and 1927 assessments so made, with the exception of The Community National Bank of Flushing which also paid the 1928 assessment in full, and The Union Savings Bank of Bellaire paid the first half of the 1928 taxes. All of the banks refused to pay further assessments of 1928, 1929 and 1930 as levied on the tax records of Belmont County, and later a lien was taken out by the tax authorities and placed on record in the recorder's office for the amounts of the unpaid taxes respectively against the several banks' real estate.

The respective actions are brought for the purpose of canceling said liens on said real estate and of making the temporary restraining order permanent as to the collection of the taxes against the respective banks, and also to recover back all that has been paid during said years by the several banks to the taxing authorities, with the exception of the said Union Savings Bank of Bellaire which makes no claim for return of paid taxes.

There was no evidence produced during the trial of these cases to show that since the assessment of the respective taxes any funds whatsoever belonging to the stockholders had come into possession of the several banks, nor that any dividends during said time had been paid to the stockholders.

The respective petitions also made a claim against the taxes assessed against said banks because of discrimination as to methods of taxation of monies and capital of building and loan companies and associations of said county, but no evidence was submitted on this matter and the matter was not presented for consideration in the hearings of these cases, so that the questions arising in these cases apply to the validity of the tax assessed by the taxing authorities independent of any matters pertaining to discrimination.

## Opinion and Decision

The Federal Law, Sec. 5219, U. S. R. S. Title 12, confers power on the various states to tax national banks and sets out four methods by which it may be accomplished.

Method 1—is, *"Tax said shares."* The federal law also provides that the imposition by any state of any one of the said four forms of taxes shall be in lieu of all the others. The state of Ohio chose to tax national banks under the provision in the federal law designated Method 1—*by taxing said shares.*

The statutes of the state of Ohio enacted pursuant to the above federal authority and which were in effect during the years 1926 to 1930, inclusive, and which were applicable to these cases are Sections 5408, 5409, 5410, 5411, 5412, 5413, 5414, 5672 and 5673.

It will be noted from an examination of the federal and state statutes pertaining to bank taxation that the state of Ohio in utilizing the first form of taxation provided by federal law, to-wit: *the taxation of bank shares,* made no differentiation between banks under the laws of the United States and banks under the laws of the state of Ohio; and therefore, both national and state banks are taxed under the same method.

It will also be noted in the law that it is incumbent upon the cashier of the bank in making his report to the taxing authority to give a full and correct list of the names and residences of the stockholders therein, and the number of shares held by each. And that under Sec. 5672 General Code, provides:

> "Taxes assessed on shares of stock or the value thereof, of a bank or banking association, *shall be a lien on such shares from the first Monday of May in each year until they are paid.*"

That same section made it the duty of every bank to collect the taxes upon its shares of stock from the several owners of such shares and to pay the same to the treasurer of the county, and provides for a penalty for the failure so to do.

Sec. 5673 provided, that a bank paying the treasurer the taxes assessed upon its shares, as provided in the law, may deduct the amount therefrom from dividends, and shall have a lien upon the shares of stock and on all funds in its possession belonging to such shareholders, or which may at

any time come into its possession *for reimbursement of the taxes so paid on account of the several shareholders.*

In all of these cases the banks are corporations organized under national or state law and as such are entities separate and apart from their stockholders or shareholders, and are not the owners of their respective shares of stock.

It will also be noted that in the authority granted by the federal law to *"tax said shares,"* that the only tax allowable is "the tax on the shares." Shares of stock in law are intangible personal property, and yet the authority conferred is a tax in rem (on the thing itself), and is the same as a tax on real estate and does not have the same attributes as a tax on personal property wherein the property itself is not liable for the tax but where the owner of the property, or the one in whose name the property is listed, is liable for the tax; a tax in rem, such as a tax on real estate, makes the land liable for the tax, while the owner is not personally liable for the tax, and a lien is always held and reserved on the land until the tax is paid.

Sec. 5909 General Code, provides—

> "For the taxation of the bank's real estate in the same manner as other real estate is taxed."

And in all of these cases for the unpaid taxes on the bank's shares for the various years a lien was taken on the bank's real estate for the full amount thereof. Is this not in truth and in fact a double taxation of the bank's real estate and is it not unconstitutional and void?

The court is of the opinion that the tax as permitted by the federal statutes and made a part of the taxing laws of the state of Ohio, *was a tax in rem and not a tax in personam,* and neither the bank nor the shareholders were personally liable for said tax but that said tax was *solely a tax on shares* and until paid a lien upon the said shares of stock. Therefore, the court comes to the conclusion that the tax on the shares applies the same as a tax on real estate and that the shares are solely liable for this tax.

It is true that the said several taxes were listed on the tax records of said county in the aggregate, yet the court

is of the opinion that the taxing authorities have always the right to correct their records, and that the tax as it stands on the records is a tax against all of the shares, which is in accordance with the finding in the case of Geller *v.* McCort, Treas., 60 Ohio Appeals, 405, wherein that court said:

> "The taxes were assessed actually against the shares, or rather the value thereof, and not against the capital stock or reserves generally of the bank."

The fact that the bank's name was placed in the listing on the personal property records, the court takes to be only descriptive of the shares listed and is not a personal tax against the bank.

It is true that Sec. 5672 General Code of Ohio, makes it the duty of every bank to collect the taxes due upon its shares of stock from the several owners of the shares and to pay the same to the treasurer of the county, but nowhere in the law does it make said tax a tax upon the bank, and the Supreme Court in the case of Miller, Treasurer, v. Bank, 46 O. S. 424, is specific in stating that no authority is granted by the United States *for listing and valuing the shares* in a national bank in the aggregate and placing such aggregate on the tax list *in the name of the bank.* Such shares when listed and valued for taxation are required to be placed on the proper tax list in the names of the respective owners. This case is unreversed and is the law of Ohio as to listing and valuing said shares. If the bank fails to do its duty, as provided in the law, the tax authorities have no right to assess the tax against it. The only authority under the law that they have is to invoke the penalty provided under Sec. 5672, and that has not been done in these cases. The tax has been treated exactly like all delinquent personal taxes. In these cases the tax has been treated solely as a tax against the bank, even to the extent of it being a personal tax against the bank on which the lien against the bank's real estate was predicated.

Sec. 5673 General Code, provides—that if a bank does pay the treasurer such tax upon its shares, that it (the bank) shall have a lien upon dividends and monies in its possession of the shareholder, etc., for reimbursement, but that

section cannot be construed that it authorizes a tax of the bank, or that the bank *must* pay said tax. In truth and in fact, the various sections of the Ohio law make the bank the collecting agency to collect the tax from the various shareholders on their shares, and then to pay the tax to the treasurer. Under the Ohio law it certainly cannot be construed that if the bank so fails to do its duty, it is liable for the tax itself. At least it could only be liable for the penalty, and the penalty does not mean the tax. And if the penalty was imposed and attempted to be enforced, the bank would have all its defenses under the law, which would be separate and distinct from the defenses against the tax itself.

The court therefore comes to the conclusion that the tax as listed for the various years in names of the several banks is a tax only *on the shares,* and that therefore the several banks are not liable for said taxes; that so far as the banks are concerned the injunction will be made permanent and the lien against their respective real estate will be dissolved and canceled of record.

Now, coming to the next question of the payment back of the taxes heretofore paid by the various banks, from the evidence presented the court does not find that said taxes were paid either under a mistake of fact or involuntarily, as the court understands "involuntary" under the law and decisions. The banks, being the agents of the shareholders by law to pay said taxes on the shares (even though the taxes were listed in the aggregate), when they so pay the same, even upon protest, it is not sufficient to make said payment involuntary; and especially so in view of the fact that the court finds that the tax was a valid tax upon the shares and whatever the bank did in paying, it acted as agent under the law. Also, that the taxing authorities have yet the right and authority to correct their books in accordance therewith by properly apportioning said tax to the various shares. So that the court on this issue finds that the plaintiffs are not entitled to a return of all or any part of money so paid on said taxes.

And further, the court finds that there is no distinction whatsoever between a national and a state bank under the taxing laws in force between 1926 and 1930.

However, since 1930 two of said banks, to-wit: The First National Bank of St. Clairsville and the Bridgeport National Bank have closed and are in the hands of trustees for liquidation. The portion in the hands of the trustees payable to stockholders by virtue of share ownership, will be applicable to the payment of taxes in full, as a lien by law on said shares of stock owned by said stockholders, before any amounts are paid by said trustees to said stockholders.

All of the other banks being in the same status, to-wit: open and continuing in business as of the present date, their shares of stock are liable respectively for the proportionate amount of said tax, which constitutes a lien by law on said shares, and may be collected as soon as the same is properly corrected upon the tax records of Belmont County, Ohio.

The above decision of the court is made for the specific reason that the third amended petition and supplemental petition on which this cause was tried contains the following:

> "This suit is prosecuted by this plaintiff (the bank) in its own behalf and for and on behalf of its shareholders having a common interest with it, and in order to avoid a multiplicity of suits."

So that the bank, being a separate entity from its shareholders, is given the relief to which it is entitled; and also, in the finding and decision of the court, the shareholders (being the owners of the shares), must accept the liability imposed upon their shares for the reason that this action was brought by the bank for and on behalf of them.

Proper journal entries may be prepared, giving both plaintiffs and defendants their exceptions.

I will only add that I have read all of the briefs filed with me, have investigated the various cases cited, and have made some further investigation, but for the sake of brevity I have refrained from numerous citations and excerpts therefrom, and have endeavored to summarize the law applicable in these cases as I found it.

## APPENDIX "B".

### Opinion—Court of Appeals.

(February 24, 1942.)

Finding and decree for plaintiffs on authority of Miller, Treasurer, v. First National Bank, et al., 46 O. S. 424. Decree accordingly. Doyle, J., dissents. No further opinion. Exceptions. (R. page 43.)

---

## APPENDIX "C".

*Supreme Court of Ohio.*

(June 30, 1943.)

(142 O. S. 6.)

*Syllabus.*

Taxation—All shares of stockholders in bank to be listed at true value—Section 5408, General Code—Tax not imposed on bank by Section 5672, General Code—Section 548, title 12, Code of Laws of United States, not violated—Tax on shares not lien on bank real estate, when—Apportionment of taxes among share owners not prerequisite to enforcing bank liability.

1. Under the provisions of Section 5408, General Code, as in effect prior to January 1, 1931, all the shares of the stockholders in an incorporated bank or banking association located in this state, incorporated or organized under the laws of this state or the United States, are required to be listed for taxation at their true value in money.

2. The provisions of Section 5672, General Code, as in effect prior to January 1, 1931, making the taxes assessed on shares of stock in a bank or banking association a lien on such shares until paid, and imposing upon such bank or banking association the duty to col-

lect the taxes due upon its shares of stock from the owners thereof and pay the same to the treasurer of the county in which such bank or banking association is located, and imposing upon any bank or banking association failing to pay such taxes a liability by way of penalty for the gross amount of taxes due from all the owners of the shares of stock, do not impose a tax on the bank and are not violative of the provisions of Section 548 of Title 12 of the Code of Laws of the United States prescribing the manner in which taxes affecting national banks may be levied and assessed.

3. The placing of the levy of taxes on the tax duplicate against the bank instead of the respective owners of the shares of stock does not constitute the same a lien on the real estate of the bank.

4. The apportionment of the aggregate amount of taxes due on bank shares among the respective owners thereof is not a prerequisite to the enforcement of the liability of a bank to collect the taxes due upon its shares of stock and pay same to the treasurer of the county by the provisions of Section 5672 General Code.

(Nos. 29197, 29198 and 29199—Decided June 30, 1943.)

*Opinion.* (142 O. S. 6.)

MATTHIAS, J.:

The question of law presented in these cases may be concisely stated as follows:

Were the taxes in question assessed on the shares of stock of the several banks or upon the property of the banks?

The record discloses that any question of discrimination against the banks and in favor of building and loan companies was abandoned and need not now be considered.

Under the provisions of Section 5408, General Code, as in effect January 1, 1931, taxes were levied on the shares of stockholders of a bank in like manner as the taxes on other personal property. Section 5408 provided as follows:

"All the shares of the stockholders in an incorporated bank or banking association, located in this state,

incorporated or organized under the laws of the state or of the United States, and all the shares of the stockholders in an unincorporated bank, located in this state, the capital stock of which is divided into shares held by the owners of such bank, and the capital employed, or the property representing it, in an unincorporated bank the capital stock of which is not divided into shares, located in this state, shall be listed at the true value in money, and taxed only in the city, ward, or village where such bank is located."

Section 5409, General Code, provided:

"The real estate of a bank or banking association shall be taxed in the place where it is located, in like manner as the real estate of persons is taxed."

The further statutory provisions involved are Sections 5672 and 5673, General Code, as in force and effect at the time these taxes were levied. They were as follows:

Section 5672. "Taxes assessed on shares of stock, or the value thereof, of a bank or banking association, shall be a lien on such shares from the first Monday of May in each year until they are paid.

"It shall be the duty of every bank or banking association to collect the taxes due upon its shares of stock from the several owners of such shares, and to pay the same to the treasurer of the county, in which such bank or banking association is located, as other taxes are paid, and any bank or banking association failing to pay the said taxes as herein provided, shall be liable by way of penalty for the gross amount of the taxes due from all the owners of the shares of stock, and for an additional amount of one hundred dollars for every day of delay in the payment of said taxes."

Section 5673. "Such bank or banking association paying to the treasurer of the county in which it is located, the taxes assessed upon its shares, in the hands of its shareholders respectively, as provided in the next preceding section, may deduct the amount thereof from dividends that are due or thereafter become due on

such shares, and shall have a lien upon the shares of stock and on all funds in its possession belonging to such shareholders, or which may at any time come into its possession, for reimbursement of the taxes so paid on account of the several shareholders, with legal interest; and such lien may be enforced in any appropriate manner."

The taxes involved in these cases were placed on the tax duplicate by the county auditor in the name of the various banks, and not in the name of the individual owners of the shares as shown by the statements filed by the banks.

The Court of Appeals based its decision entirely upon the case of Miller, Treas., *v.* First National Bank, 46 Ohio St., 424, 21 N. E. 860. While the issues in that case were similar to those of the instant case, the statute then in effect was essentially different. The statutory provisions applicable in that case were embodied in Sections 2839 and 2840, Revised Statutes, which read as follows:

Section 2839. "Any taxes assessed on any shares of stock or the value thereof, of any bank or banking association, shall be and remain a lien on such shares from the first Monday of May in each year until such taxes are paid; and in case of the non-payment of such taxes at the time required by law by any shareholder, and after notice received of the county treasurer of the non-payment of such taxes, it shall be unlawful for the cashier or other officer of such bank or banking association to transfer or permit to be transferred the whole or any portion of said stock, until the delinquent taxes thereon, together with costs and penalties, shall be paid in full; and no dividend shall be paid on any stock so delinquent, so long as such taxes, penalties, and costs, or any part thereof, remain due and unpaid."

Section 2840. "It shall be lawful for any such bank or banking association to pay to the treasurer of the county in which such bank or banking association may be located, the taxes that may be assessed upon its shares, as aforesaid, in the hands of its shareholders,

> respectively, and deduct the same from any dividends that may be due or may thereafter become due on any such shares, or deduct the same from any funds in its possession belonging to any shareholder, as aforesaid."

It is to be observed that under these statutory provisions the bank was authorized but not required to pay the taxes upon its shares and deduct the sums so paid not only from dividends due or thereafter to become due on such shares, but also from any funds in its possession belonging to any shareholder.

The question, and the only question, decided in the *Miller* Case is clearly and concisely stated in the first paragraph of the syllabus, which reads:

> "There is no authority in the statutes of the state, nor of the United States, for listing and valuing the shares in a national bank in the aggregate, and placing such aggregate on the tax-list in the name of the bank. Such shares, when listed and valued for taxation, are required to be placed on the proper tax-list in the names of the respective owners."

The statutory provisions then in effect not only conferred no authority to charge the tax on the duplicate in the name of the bank, but imposed no duty whatever on the bank to collect the tax.

The provisions of Sections 5672 and 5673, General Code, are of somewhat different import and effect and are controlling in the disposition of these cases. These statutes were amended as they now read subsequent to the decision in the case of Aberdeen Bank *v.* Chehalis County, 166 U. S., 440, 41 L. Ed., 1069, 17 S. Ct., 629. The Aberdeen bank had likewise made the complaint that the statute of the state of Washington which it challenged levied the tax on the bank instead of the owners of the shares, and violation of the provisions of Section 5219, U. S. Revised Statutes (February 10, 1868); 15 Stats. at L., 34, Chapter 7, was charged. The Washington statute provided that

> "each bank and banking association shall be liable to pay any taxes assessed against them as the agent of

each of its shareholders, owners or owner under the provisions of this act, and may pay the same out of their individual profit account or charge the same to their expense account, or to the accounts of such shareholders, owners or owner in proportion to their ownership."

The Court held that, by reason of this provision of the Washington statute, there was no ground for the contention that the taxation of "the capital of the bank" was contemplated by the statute under consideration. The opinion of the court in the *Aberdeen* Case approves and applies the decision of the same court in the case of First National Bank of Louisville *v.* Commonwealth, 76 U. S. (9 Wall,), 353, 19 L. Ed., 701, which involved the construction of a statute of the state of Kentucky providing in substance that a tax should be levied on the

"bank stock, or stock in any moneyed corporation of loan or discount, fifty cents on each share thereof equal to $100, or on each $100 of stock therein owned by individuals, corporations, or societies."

Such statute contained the further provision that

"the cashier of a bank, whose stock is taxed, shall on the first day in July of each year, pay into the treasury the amount of tax due. If such tax be not paid, the cashier and his sureties shall be liable for the same, and twenty per cent upon the amount."

The contention there made was that the bank could not be made responsible for a tax levied on the shares of stock which were the property of the individual stockholders and could not be compelled to collect and pay such tax.

In the course of the opinion in that case it was stated as follows:

"It is strongly urged that it is to be deemed a tax on the capital of the bank, because the law requires the officers of the bank to pay this tax on the shares of its stockholders. Whether the state has the right to do this we will presently consider, but the fact that

it has attempted to do it does not prove that the tax is anything else than a tax on these shares. It has been the practice of many of the states for a long time to require of its corporations thus to pay the tax levied on their shareholders. It is the common, if not the only, mode of doing this in all the New England states, and in several of them the portion of this tax which should properly go as the shareholders' contribution to local or municipal taxation is thus collected by the state of the bank and paid over to the local municipal authorities. In the case of shareholders not residing in the state, it is the only mode in which the state can reach their shares for taxation. We are, therefore, of opinion that the law of Kentucky is a tax upon the shares of the stockholder. * * *

"A very nice criticism of the proviso to the 41st section of the National Bank Act (now Section 5219 of the Revised Statutes), which permits the states to tax the shares of such bank, is made to us to show that the tax must be collected of the shareholder directly, and that the mode we have been considering is by implication forbidden. But we are of opinion that while Congress intended to limit state taxation to the shares of the bank, as distinguished from its capital, and to provide against a discrimination in taxing such bank shares unfavorable to them, as compared with the shares of other corporations, and with other moneyed capital, it did not intend to prescribe to the states the mode in which the tax should be collected. The mode under consideration is the one which Congress itself has adopted in collecting its tax on dividends, and on the income arising from bonds of corporations. It is the only mode which, certainly and without loss, secures the payment of the tax on all the shares, resident or non-resident; and, as we have already stated, it is the mode which experience has justified in the New England states as the most convenient and proper, in regard to the numerous wealthy corporations in those states. It is not to be readily inferred, therefore, that Congress intended to prohibit this mode of col-

lecting a tax which they expressly permitted the states to levy."

The court, in the *Aberdeen* Case, after calling attention to the portion of the opinion in the case of National Bank *v.* Commonwealth, supra, above quoted, cited as supporting the doctrine therein announced, the cases of Bell's Gap Rd. *v.* Pennsylvania, 134 U. S., 232, 33 L. Ed., 892, 10 S. Ct., 533, and Van Slyke *v.* Wisconsin, 154 U. S. 581, 20 L. Ed. 240, 14 S. Ct., 1168.

The tax in the instant cases, just as the tax under consideration in the *Aberdeen* Case, is a tax on shares of stock properly assessed for the payment of which each bank was made liable by the specific provisions of statute. The *Aberdeen* Case is unreversed, and the doctrine there announced, which in our opinion is clearly applicable here, has not been modified by the subsequent decisions relied upon by counsel for the banks, which are Owensboro National Bank *v.* City of Owensboro, 173 U. S., 664, 43 L. Ed., 850, 19 S. Ct., 537, and First National Bank of Gulfport *v.* Adams, Rev. Agt., 258 U. S., 362, 66 L. Ed., 661, 42 S. Ct., 323.

In the comparatively recent case of Colorado National Bank of Denver *v.* Bedford, 310 U. S., 41, 84 L. Ed., 1067, 60 S. Ct., 800, the Supreme Court of the United States had for consideration the validity of the Colorado statute laying a percentage tax on the users of the safety deposit services of banks measured by the banks' charges for the services and requiring the banks to collect the taxes, account for them to the state and include them in their bills for the services. The court held that the statute

> "requiring a national bank to collect and remit the tax does not impose an unconstitutional burden on a federal instrumentality."

In support of that proposition, the court cites the case of National Bank *v.* Commonwealth, supra.

The court, however, reiterated previous holdings in various other cases there cited, in substance that a

> "tax is invalid if laid upon the bank as an instrumentality of government * * *; that its banking opera-

> tions are free from state taxation except as Congress may permit; that Congress permits the taxation only of shares and real estate; and that Congress may intervene to protect its instrumentalities from any other tax which threatens their usefulness."

As heretofore stated, the liability of a bank to pay taxes lawfully assessed on the shares of its stockholders is created by Sections 5672 and 5673, General Code. The former section provides that taxes assessed on the shares of the stockholders of the bank are

> "a lien on such shares from the first Monday of May in each year until they are paid."

The latter section provides that the bank, upon payment of the taxes assessed, has

> "a lien upon the shares of stock and on all funds in its possession belonging to such shareholders, or which may at any time come into its possession for reimbursement of the taxes so paid on account of the several shareholders, with legal interest."

We find no other statutory provisions which specifically create a lien on behalf of a county for the payment of the taxes in question. In the absence of statutory authority, such taxes do not become a lien upon the real estate of the bank. The liability of the bank is limited by the specific provisions of the statute previously referred to. It follows that there is no valid lien now on the real estate of the bank for the taxes in question, but they may be collected by an appropriate action on the part of the county treasurer.

However, the apportionment of the tax on the duplicate to the various shareholders is not a prerequisite to the proceeding of the treasurer to enforce the liability imposed on the bank by statute. For the reasons heretofore stated, the court is in accord with the contention of counsel for the banks that the taxes due and unpaid are not a valid lien on the real estate owned by the bank and to that extent they are entitled to the relief sought. This leads to an affirmance

of the judgments in that respect only. In all other respects the judgment in each case is reversed.

Judgments accordingly.

Weygandt, C. J., Hart, Zimmerman and Turner, JJ., concur. Bell and Williams, JJ., not participating.

---

## APPENDIX "D".

Filed Auditors Office, Belmont County, May 14, 1928. H. G. Finley, County Auditor.

**Statement of Resources and Liabilities of the Bank for the Year 1928.**

(Excerpt from Exhibit marked PX3)

Tax Notice for National Banks for 1928.

Forms for Bank Statements, in duplicate, under the provisions of Sections 5407 to 5414, inclusive, of the General Code of Ohio.

Banks or Banking Associations Organized under the Laws of the United States.

To the Cashier of the Second National Bank, St. Clairsville, Ohio:

SIR: You are hereby required to make out upon the forms herewith, and return to me at my office, at St. Clairsville, in the County of Belmont, Ohio, between the first and second Mondays of May, 1928, a report in Duplicate, under oath, exhibiting in detail the resources and liabilities of the above Bank or Banking Association, at the close of business on the Wednesday next preceding the said second Monday of May, together with a full statement of the names and residences of stockholders therein with the number of shares held by each and the par value of each share. This return must be accompanied by a copy of the report to the Comptroller of Currency of the United States, made next prior to the said second Monday of May.

This report must correspond with the face of the bank's books.

If the bank claims any allowance intended to reduce the amount of capital, surplus fund or undivided profits, as the same is shown by its books, the items must be set forth in detail stating the reasons therefor. The deductions must not be made from the resources or liabilities.

ALL QUESTIONS MUST BE ANSWERED OR REPORT WILL NOT BE ACCEPTED.

Dated ....., 192.... .....

*Auditor of Belmont County, Ohio.*

---

Resources May 9, 1928.

| | |
|---|---|
| Loans and Discount | 691,116.27 |
| Overdrafts | 28.13 |
| U. S. Bonds to secure circulation | 100,000.00 |
| U. S. Bonds to secure deposits | 5,000.00 |
| Bonds, Securities, etc. including premium | 258,165.05 |
| Due from approved reserve agents | 47,211.09 |
| Due from banks and bankers | 192,226.33 |
| Real Estate | |
| Furniture and fixtures | 1,300.00 |
| Checks and other cash items | 295.17 |
| Exchange for clearing house | |
| Paper currency and coin | 20,372.01 |
| Due from U. S. Treasurer | 5,000.00 |
| Other resources in detail (Whether entered on books of bank or not) | |
| Total | 1,320,714.05 |

## Liabilities.

| | | |
|---|---|---|
| Capital stock paid in | | 100,000.00 |
| Surplus fund | | 125,000.00 |
| Undivided profits (See Note) | $48,697.49 | |
| Less current expenses, taxes and interest paid | $20,301.17 | |
| Net undivided profits | 28,396.32 | 28,396.32 |
| National bank notes outstanding | | 98,850.00 |
| Dividends unpaid | | |
| Individual deposits | | 960,007.50 |
| United States deposits Postal Sav. | | 8,132.39 |
| Due to other national banks | | |
| Due to state banks and bankers | | 327.84 |
| Notes and bills rediscounted | | |
| Bills payable | | |
| Other liabilities in detail: | | |
| Total | | 1,320,714.05 |

Note:—This item must include all earnings of the bank to whatsoever account credited, except dividends unpaid. If any special funds arising out of earnings and undivided profits, belonging to the bank, are not included in the general statement, the same must be reported for taxes under undivided profits. Some banks carry funds of the above description in certificates of deposits, and on individual ledgers, etc., and these funds must be returned for taxation.

**Real Estate in Ohio**

| Where Situated | | Description | | | | | Value |
|---|---|---|---|---|---|---|---|
| Counties | Name of Township, Special School District, City or Incorporated Village | General Description | No. of Lot | Area Acres 1/100 | True or Actual | As Carried on Books of Bank | As assessed (To be supplied by county auditor) |
| —— None —— | | | | | | | |

I, Otto Giffin, Cashier of The Second National Bank, of St. Clairsville, Ohio, do hereby certify that

| | |
|---|---|
| The amount of its authorized capital stock is | $100,000 |
| The total number of shares is | 1,000 |
| The total market value of its shares is | 220,000 |
| The total actual value (if there is no market value) of its shares is | 253,000 |
| The actual value of the furniture and fixtures is | 1,300 |
| The total amount of the dividends declared during the past year was | 14,000 |

The dividend paying periods during the past year were May and November.

(s) Otto Giffin,
*Cashier.*

Affidavit.

The State of Ohio, Belmont County, ss.

I, Otto Giffin, Cashier of The Second National Bank of St. Clairsville, Ohio, do solemnly swear the statements contained in the foregoing report, including the statement of the resources and liabilities, the real estate, the names and residences of the stockholders, the number of shares held by each and the par value and actual value of the shares of said bank at the close of business on the Wednesday next preceding the second Monday of May, 1928 are true and correct.

(s) Otto Giffin,
*Cashier.*

Sworn to and subscribed before me, a Notary Public in and for said County, this 12th day of May, 1928.

(s) A. Van Patton.

Report of the Condition of

The Second National Bank

of

St. Clairsville, in the State of Ohio

At the close of business February 28, 1928.

(Details Omitted)

Names and Residences of Stockholders and Number of Shares Held by Each.

(Details Omitted)

OFFICE OF THE AUDITOR OF BELMONT COUNTY

St. Clairsville, Ohio, 1928.

To the Tax Commission of Ohio:

I Hereby Certify, That I have fixed the value of the shares of Second Nat'l Bank of St. Clairsville, Ohio, for the year 1928, as follows:

| | |
|---|---|
| 1000 shares of a total par value of $100.00 at | $253 400 |
| From which is to be deducted the value of the real estate in Ohio included in the statement of resources of said bank assessed for taxation for the current year at | None |
| Leaving taxable valuation to be entered on personal property duplicate at | $253 400 |

(s) HOMER G. FINLEY,
*Auditor of Belmont County, Ohio.*

Filed Auditors Office, Belmont County, May 10, 1929.
H. G. Finley, County Auditor.

STATEMENT OF RESOURCES AND LIABILITIES OF THE BANK FOR THE YEAR 1929.

(Excerpt from Exhibit marked PX 4.)

TAX NOTICE FOR NATIONAL BANKS FOR 1929.

Forms for Bank Statements, in duplicate, under the provisions of Sections 5407 to 5414, inclusive, of the General Code of Ohio.

Banks or Banking Associations Organized under the Laws of the United States.

To the Cashier of the Second National Bank, St. Clairsville, Ohio:

SIR: You are hereby required to make out upon the forms herewith, and return to me at my office, at St. Clairsville, in the County of Belmont, Ohio, between the first and second Mondays of May, 1929, a report in Duplicate, under oath, exhibiting in detail the resources and liabilities of the above Bank or Banking Association, at the close of business on the Wednesday next preceding the said second Monday of May, together with a full statement of the names and residences of stockholders therein with the number of shares held by each and the par value of each share. This return must be accompanied by a copy of the report to the Comptroller of Currency of the United States, made next prior to the said second Monday of May.

This report must correspond with the face of the bank's books.

If the bank claims any allowance intended to reduce the amount of capital, surplus fund or undivided profits, as the same is shown by its books, the item must be set forth in detail stating the reasons therefor. Deductions must not be made from resources or liabilities.

ALL QUESTIONS MUST BE ANSWERED OR REPORT WILL NOT BE ACCEPTED.

Dated —— —, 192—. —— ——,

*Auditor of Belmont County, Ohio.*

| Resources | | |
|---|---|---|
| Loans and Discounts | | 762,757.06 |
| Overdrafts | | 33.46 |
| U. S. Bonds to secure circulation | | 100,000. |
| U. S. Bonds to secure deposits | | 5,000. |
| Bonds, Securities, etc., including premium | | 232,558.26 |
| Due from approved reserve agents | | 47,706.91 |
| Due from banks and bankers | | 197,943.14 |
| Real estate | | |
| Furniture and fixtures | | 1,000. |
| Checks and other cash items | | 2,092.59 |
| Exchanges for clearing house | | |
| Paper currency and coin | | 19,019.34 |
| Due from U. S. Treasurer | | 5,000. |
| Other resources in detail: (Whether entered on books of bank or not) | | |
| Total | | 1,373,110.76 |

| Liabilities | | |
|---|---|---|
| Capital stock paid in | | 100,000. |
| Surplus fund | | 125,000. |
| Undivided profits (See Note) | $55,125.30 | |
| Less current expenses, taxes and interest paid | $19,737.66 | |
| Net undivided profits | 35,387.64 | 35,387.64 |
| National bank notes outstanding | | 100,000. |
| Dividends unpaid | | |
| Individual deposits | | 1,008,374.94 |
| United States deposits | | |
| Due to other national banks | | |
| Due to state banks and bankers | | 1,247.55 |
| Notes and bills rediscounted | | |
| Bills payable | | |
| Other Liabilities in detail: | | |
| Cashier's Checks | | 3,100.63 |
| | | 1,373,110.76 |

Note:—This item must include all earnings of the bank to whatsoever account credited, except dividends unpaid.

If any special funds arising out of earnings, and undivided profits, belonging to the bank, are not included in the general statement, the same must be reported for taxes under undivided profits. Some banks carry funds of the above description in certificates of deposits, and on individual ledgers, etc. and these funds must be returned for taxation.

| Where Situated | | Description | | | | | Value |
|---|---|---|---|---|---|---|---|
| Counties | Names of Township, Special School District, City or Incorporated Village | General Description | No. of Lot | Area Acres 1/100 | True or Actual | As Carried on Books of Bank | As assessed (To be supplied by county auditor) |
| | Total in Ohio..... | | | | | | |

I, Otto Griffin, Cashier of The Second National Bank, of St. Clairsville, Ohio, do hereby certify that

| | |
|---|---|
| The amount of its authorized capital stock is | $100,000.00 |
| The total number of shares is | 1,000 |
| The total market value of its shares is | 220,000.00 |
| The total actual value (if there is no market value) of its shares is | |
| The actual value of the furniture and fixtures is | 1,000. |
| The total amount of the dividends declared during the past year was | 14,000.00 |

The dividend paying periods during the past year were May 1 and Nov. 1.

(s) Otto Giffin,
*Cashier.*

Affidavit

The State of Ohio, Belmont County, ss.

I, Otto Giffin, Cashier of The Second National Bank, of St. Clairsville, Ohio, do solemnly swear that the statements contained in the foregoing report, including the statement of the resources and liabilities, the real estate, the names and residences of the stockholders, the number of shares

held by each and the par value and actual value of the shares of said bank at the close of business on the Wednesday next preceding the second Monday of May, 1929 are true and correct.

(s) OTTO GIFFIN,
*Cashier.*

Sworn to and subscribed before me, a Notary Public in and for said County, this 10th day of May, 1929.

(s) A. VAN PATTON.

Report of the Condition of
THE SECOND NATIONAL BANK
of
St. Clairsville, in the State of Ohio.
At the close of business on March 27, 1929

(Details Omitted.)

---

Names and residences of Stockholders and Number of Shares held by each.

(Details Omitted.)

---

OFFICE OF THE AUDITOR OF BELMONT COUNTY.

St. Clairsville, Ohio, 1929.

To the Tax Commission of Ohio:

I Hereby Certify, That I have fixed the value of the shares of Second National Bank of St. Clairsville, Ohio, for the year 1929, as follows:

| | |
|---|---|
| 1000 shares of a total par value of $100,000 at | $260 390 |
| From which is to be deducted the value of the real estate in Ohio included in the statement of resources of said bank assessed for taxation for the current year at | $ |
| Leaving taxable valuation to be entered on personal property duplicate at | $260 390 |

(S.) H. G. FINLEY,
*Auditor of Belmont County, Ohio.*

Filed Auditors Office, Belmont County, May 13, 1930. H. G. Finley, County Auditor.

STATEMENT OF RESOURCES AND LIABILITIES OF THE BANK FOR THE YEAR 1930.

(Excerpt from Exhibit marked PX 5.)

TAX NOTICES FOR NATIONAL BANKS FOR 1930.

Forms for Bank Statements, in duplicate, under the provisions of Sections 5407 to 5414, inclusive, of the General Code of Ohio.

Banks or Banking Associations Organized under the Laws of the United States.

To the Cashier of the Second National Bank,
St. Clairsville, Ohio:

Sir: You are hereby required to make out upon the forms herewith, and return to me at my office, at St. Clairsville, in the County of Belmont, Ohio, between the first and second Mondays of May, 1930, a report in Duplicate, under oath, exhibiting in detail the resources and liabilities of the above Bank or Banking Association, at the close of business on the Wednesday next preceding the said second Monday of May, together with a full statement of the names and residences of stockholders therein with the number of shares held by each and the par value of each share. This return must be accompanied by a copy of the report to the Comptroller of Currency of the United States, made next prior to the said second Monday of May.

This report must correspond with the face of the bank's books.

If the bank claims any allowance intended to reduce the amount of capital, surplus fund or undivided profits, as the same is shown by its books, the items must be set forth in detail stating the reasons therefor. Deductions must not be made from resources or liabilities.

ALL QUESTIONS MUST BE ANSWERED OR REPORT WILL NOT BE ACCEPTED

Dated May 5, 1930.

HOMER G. FINLEY,
*Auditor of Belmont County, Ohio.*

Resources.

| | |
|---|---|
| Loans and Discounts | 680,198.96 |
| Overdrafts | 76.29 |
| U. S. Bonds to secure securities | 100,000. |
| U. S. Bonds to secure deposits | 10,000. |
| Bonds, Securities, etc. including premium | 239,390.29 |
| Due from approved reserve agents | 47,818.26 |
| Due from banks and bankers | 118,104.45 |
| Real estate | 14,500. |
| Furniture and fixture | 1,000. |
| Checks and other cash items | 1,389.33 |
| Exchanges for clearing house | |
| Paper currency and coin | 53,079.45 |
| Due from U. S. Treasurer | 5,000. |
| Other resources in detail: (Whether entered on books of bank or not) | |
| | 1,270,557.03 |

## Liabilities.

| | | |
|---|---|---|
| Capital Stock paid in | | 100,000. |
| Surplus fund | | 150,000. |
| Undivided profts (See Note) | $38,584.18 | |
| Less current expenses, taxes and interest paid | $19,699.07 | |
| Net undivided profits | | 18,885.11 |
| National bank notes outstanding | | 100,000. |
| Dividends unpaid | | |
| Individual deposits | | 869,766.11 |
| United States deposits | | 9,202.87 |
| Due to other national banks | | 9,495.69 |
| Due to state banks and bankers | | 1,690.44 |
| Notes and bills rediscounted | | |
| Bills payable | | |
| Other liabilities in detail: | | |
| Cashier's Checks | | 11,516.81 |
| Total | | 1,270,557.03 |

Note: This item must include all earnings of the bank to whatsoever account credited, except dividends unpaid. If any special funds arising out of earnings and undivided profits, belonging to the bank, are not included in the general statement, the same must be reported for taxes under undivided profits. Some banks carry funds of the above description in certificates of deposits, and on individual ledgers, etc., and these funds must be returned for taxation.

Real Estate in Ohio

| Where Situated | | Description | | | | | Value |
|---|---|---|---|---|---|---|---|
| Counties | Name of Township, Special School District, City or Incorporated Village | General Description | No. of Lot | Area Acres 1/100 | True or Actual | As Carried on Books of Bank | As assessed (To be supplied by county auditor) |
| Total in Ohio | | | | | | | |

I, Otto Giffin, Cashier of the Second National Bank of St. Clairsville, Ohio do hereby certify that

| | |
|---|---|
| The amount of its authorized capital stock is | $100,000 |
| The total number of shares is | 1,000 |
| The total market value of its shares is | 225,000 |
| The total actual value (if there is no market value) of its shares is | 240,000 |
| The actual value of the furniture and fixtures is | 1,000 |
| The total amount of the dividends declared during the past year was | 14,000 |

The dividend paying periods during the past year were Nov., 1929 and May, 1930.

——— ———,
*Cashier.*

Affidavit.

The State of Ohio, Belmont County, ss.:

I, Otto Giffin, Cashier of The Second National Bank of St. Clairsville, Ohio, do solemnly swear that the statements contained in the foregoing report, including the statement of the resources and liabilities, the real estate, the names and residences of the stockholders, the number of shares held by each and the par value and actual value of the shares of said bank at the close of business next on the Wednesday next preceding the second Monday of May, 1930 are true and correct.

(S.) Otto Giffin,
*Cashier.*

Sworn to and subscribed before me, a Notary Public in and for said County, this 12 day of May, 1930.

(S.) A. Van Patton.

Report of the Condition of

The Second National Bank

of

St. Clairsville, in the State of Ohio.

At the Close of business on March 27, 1930.

(Details Omitted.)

Names and residences of Stockholders and Number of Shares held by each.

(Details Omitted.)

---

OFFICE OF THE AUDITOR OF BELMONT COUNTY.

St. Clairsville, Ohio, 1930.

To the Tax Commission of Ohio:

I Hereby Certify, That I have fixed the value of the share of Second Nat'l Bank of St. Clairsville, Ohio, for the year 1930, as follows:

| | |
|---|---|
| 1000 shares of a total par value of $100000, at | $257 89 |
| From which is to be deducted the value of the real estate in Ohio included in the statement of resources of said bank assessed for taxation for the current year at | $3 50 |
| Leaving taxable valuation to be entered on personal property duplicate at | $254 39 |

(S.) HOMER G. FINLEY,
*Auditors of Belmont County, Ohio.*

COPY BOUND VERTICALLY

## APPENDIX "E".

141

PX13

TREASURER'S DUPLICATE OF TAXES ASSESSED ON PERSONAL PROPERTY IN ST. CLAIRSVILLE VILLAGE, BELMONT COUNTY, OHIO, FOR THE YEAR 1928

Banks

| Receipt No. | Owner's Name | Value as Equalized by Assessor | Total Tax Due Dec., 1928 | Total Tax 1928 and Delinquent Tax 1927 | Tax of Dec. 1928 not paid | Total Tax and Penalty Due June, 1929 |
|---|---|---|---|---|---|---|
| | | | Dols. cts. | Dols. cts. | Dols. cts. | Dols. cts. |
| 4104 | The Second National Bank | 253400 | 3142.16 | 6284.32 | 3142.16 | 6284.32 |

(NOTE: Headings of blank columns omitted)

144

PX14

TREASURER'S DUPLICATE OF TAXES ASSESSED ON PERSONAL PROPERTY IN ST. CLAIRSVILLE VILLAGE, BELMONT COUNTY, OHIO, FOR THE YEAR 1929

Banks

| Receipt No. | Owner's Name | Value as Equalized by Assessor | Total Tax Due Dec., 1929 | Remarks | Total Tax 1929 and Delinquent Tax 1928 | Tax of Dec. 1929 Not Paid | Penalty on Dec. Tax | Total Tax and Penalty Due June 1930 | Remarks |
|---|---|---|---|---|---|---|---|---|---|
| | | | Dols. cts. | | Dols. cts. | Dols. cts. | Dols. cts. | Dols. cts. | |
| 4085 | The Second National Bank | 260390 | 3515.26 | Delinquent | 7030.52 | 3515.26 | 703.05 | 7733.57 | Delinquent |

(NOTE: Headings of blank columns omitted)

COPY BOUND VERTICALLY





TREASURER'S DUPLICATE OF TAXES ASSESSED ON PERSONAL PROPERTY IN ST. CLAIRSVILLE VILLAGE, BELMONT COUNTY, OHIO, FOR THE YEAR 1930

Banks

| Receipt No. | Owner's Name | Value as Equalized by Assessor | One-Half Tax 1930 | Total Tax Due Dec., 1930 | Remarks | Total Tax 1930 and Delinquent Tax 1929 | Tax of Dec. 1930 Not Paid | Penalty on Dec. Tax |
|---|---|---|---|---|---|---|---|---|
| | | | Dols. cts. | Dols. cts. | | Dols. cts. | Dols. cts. | Dols. cts. |
| 4060 | The Second National | 254390 | 4019.36 | 4019.36 | Delinquent | 8038.72 | 4019.36 | 803.87 |

(Continuation from right hand margin of page)

| Total Tax and Penalty Due June, 1931 | Remarks | | |
|---|---|---|---|
| Dols. cts. | | | |
| 8842.59 | Delinquent | 4 | 8842.59 |

(NOTE: Headings of blank columns omitted)

NOV 10 1943

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

---

# No. 421

---

THE SECOND NATIONAL BANK OF ST. CLAIRSVILLE, OHIO,

*Appellant,*

*vs.*

HOMER J. FINDLEY, AS TREASURER OF BELMONT COUNTY, OHIO, AND E. E. TAYLOR, AS AUDITOR OF BELMONT COUNTY, OHIO,

*Appellees.*

---

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO.

---

## BRIEF OF APPELLANT ANSWERING BRIEF OF APPELLEES IN OPPOSITION TO THE APPEAL TO THIS COURT.

---

GEORGE THORNBURG,
EARL R. LEWIS,
*Counsel for Appellant.*

THORNBURG & LEWIS,
*Of Counsel.*

# INDEX.

## Subject Index.


| | Page |
|---|---|
| Brief in opposition to the motion to dismiss or affirm | 1 |
| Facts of the case | 1 |
| Argument | 4 |
| National banks are taxable by state authority only in the manner Congress permits by federal statute | 4 |
| The State of Ohio, pursuant to the authority granted by the federal statute (R. S. Section 5219), has elected to tax the shares of the stockholders | 4 |
| Questions presented on this Appeal | 6 |
| Jurisdiction of this Court to entertain this appeal | 7 |
| Various contentions of appellees answered | 9 |
| Addendum No. 1—Section 5219 Revised Statutes | 18 |
| Addendum No. 2—Sections 5408 to Section 5414 of the General Code of Ohio | 20 |
| Addendum No. 3—Sections 2583, 2585, 5367 and 5579 of the General Code of Ohio | 23 |


## Table of Cases Cited.


| | |
|---|---|
| *Carpenter* v. *Shaw*, 280 U. S. 363, 50 Sup. Ct. 121, 74 L. Ed. 478 | 8 |
| *Colorado National Bank of Denver* v. *Bedford*, 310 U. S. 41 | 7,9 |
| *Covington* v. *First National Bank*, 198 U. S. 100 | 15 |
| *Dahnke-Walker Co.* v. *Bondurnt*, 257 U. S. 282, 42 Sup. Ct. 106, 66 L. Ed. 239 | 8 |
| *Des Moines National Bank* v. *Fairweather*, 263 U. S. 103 | 13 |
| *District of Columbia* v. *Sweeney*, 310 U. S. 631 | 9 |
| *First National Bank* v. *Kentucky*, 76 U. S. 353 | 15 |
| *First National Bank of Aberdeen* v. *Chehalis County*, 166 U. S. 440 | 13,14,16 |
| *First National Bank of Gulfport* v. *Adams*, 258 U. S. 362, 66 L. Ed. 661, 42 Sup. Ct. 323 | 4,11,15 |

Page

*First National Bank of Guthrie* v. *Anderson*, 269 U. S. 341, 46 Sup. Ct. 135, 70 L. Ed. 295 ..... 8
*Indiana, ex rel. Anderson* v. *Brand*, 303 U. S. 98 ..... 7
*McCormick* v. *Market Bank*, 165 U. S. 338, 17 Sup. Ct. 433, 41 L. Ed. 817 ..... 9
*McCulloch* v. *Maryland*, 4 Wheat. 316 ..... 4
*Near* v. *Minnesota*, 283 U. S. 697, 51 Sup. Ct. 625, 75 L. Ed. 1357 ..... 8
*Owensboro National Bank* v. *Owensboro*, 173 U. S. 664, 4,7,11,15
*Schuylkill Trust Co.* v. *Pennsylvania*, 296 U. S. 102 .... 15
*Standard Oil Company of California* v. *Johnson*, 62 Sup. Ct. 1168, 86 L. Ed. 1611 ..... 8
*Tappan* v. *Merchants National Bank*, 86 U. S. 490 ..... 15
*Union Savings Bank* v. *Pancoast, Treasurer*, 142 Ohio State 6 ..... 3
*Ward* v. *Krinsky*, 259 U. S. 502, 42 Sup. Ct. 529, 66 L. Ed. 1033, 28 A. L. R. 1207 ..... 8

STATUTES CITED.

Constitution of the United States, 14th Amendment .. 2,6,16
General Code of Ohio:
Section 2583 ..... 5
Section 2585 ..... 5
Section 5367 ..... 5
Section 5408 to 5414 ..... 5
Section 5579 ..... 5
Section 5672 ..... 5
Section 5673 ..... 5

Laws of Washington, Sections 21 and 23 ..... 13
Revised Statutes, Section 5219 (12 U. S. C. 548), 2,4,6,11,15,16

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1943**

# No. 421

THE SECOND NATIONAL BANK OF ST. CLAIRSVILLE, OHIO,

*Appellant,*

*vs.*

HOMER J. FINDLEY, AS TREASURER OF BELMONT COUNTY, OHIO, AND E. E. TAYLOR, AS AUDITOR OF BELMONT COUNTY, OHIO,

*Appellees.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO.

## BRIEF OF APPELLANT ANSWERING BRIEF OF APPELLEES IN OPPOSITION TO THE APPEAL TO THIS COURT.

### Facts of the Case.

The County Auditor of Belmont County, Ohio, the assessing officer under Ohio Law, listed and assessed taxes in the name of and against Appellant, The Second National Bank of St. Clairsville, Ohio, on the County Auditor's Tax List and the County Treasurer's Tax Duplicate:

For the year 1928 in the sum of $6284.32
For the year 1929 in the sum of 7030.52
For the year 1930 in the sum of 4019.36

The tax, as entered on the Auditor's Tax List and the Treasurer's Tax Duplicate for the year 1929, as an example, in its pertinent parts, is as follows:

| "Owner's Name | Value as Equalized by Assessor | Total Tax Due Dec., 1929 | Total Tax 1929 and Delinquent Tax 1928 | Penalty on December Tax |
|---|---|---|---|---|
| The Second National Bank... | 260,390 | 3515.26 | 7030.52 | 703.05" |

The assessments for the years 1928 and 1930 were exactly the same, except for differences in valuation and the amount of the tax and penalty.

These taxes were arrived at by computing the value of the capital, surplus and undivided profits of the bank, excluding real estate, and applying thereto the tax rate for each of the years in question, as shown by the testimony of County Auditor, E. E. Taylor, (R. pages 115 and 116; Statement of Jurisdiction, page 33½).

Believing these taxes to be illegal because they were taxes against the Bank on its net capital, surplus and undivided profits, after deducting real estate, instead of taxes against the shareholders on the value of their shares, and, therefore, in violation of Section 5219, Revised Statutes of the United States, and Section 1 of the Fourteenth Amendment to the Constitution of the United States, Appellant brought a suit in each of the years in question in the Common Pleas Court of Belmont County, Ohio, the trial court, to have said taxes decreed null and void and to enjoin the collection of the same.

When said taxes became delinquent, a penalty was imposed by the County Auditor and thereupon a statement of such delinquent taxes was filed with the County Recorder under a statute which thereby gave the county a lien on the real estate of the Appellant.

The suits to declare said taxes null and void and to enjoin their collection were commenced, and later the three

suits were consolidated into this one action by order of the Common Pleas Court of Belmont County, Ohio, the trial court, which court issued an injunction restraining the collection of said taxes and cancelled the lien on the real estate of Appellant. Thereupon the case was appealed to the Court of Appeals of Belmont County, Ohio, which enjoined Appellees from collecting said taxes and penalties and ordered the liens on the real estate of Appellant to be cancelled of record. Thereupon the case was certified by the Court of Appeals to the Supreme Court of Ohio, which Court sustained that portion of the judgment of the Court of Appeals which cancelled the lien on the real estate but reversed that portion of the judgment which enjoined Appellees from collecting the tax and held the tax to be a valid tax. (*Union Savings Bank* v. *Pancoast, Treasurer, et al.*, 142 Ohio State 6).

Appellant, in its Third Amended Petition, upon which the case was heard, charged that the taxes in question:

> "were contrary to law and in violation of plaintiff's legal and constitutional rights in the following respects, to-wit:
>
> "(a) There is no Statute of Ohio, nor of the United States of America, authorizing or permitting the auditor to make said assessments of taxes against plaintiff.
>
> "(b) * * *.
>
> "(c) The Statutes of Ohio under authority of which said auditor and treasurer pretend to have assessed said taxes against plaintiff and to have the right to collect the same from plaintiff, respectively, are in violation of Section 5219, Revised Statutes of the United States of America, now Section 548 of Title 12 of the United States Code, and also in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States of America. * * *"

## ARGUMENT.

**1. National banks are taxable by State authority only in the manner Congress permits by Federal Statute (McCulloch v. Maryland, 4 Wheat., 316; Owensboro National Bank v. Owensboro (1899), 173 U. S. 664, 43 L. Ed. 850).**

> "Section 5219, Revised Statutes, prescribes the full measure of the power of the several states to impose taxes upon national banking associations or their stockholders."—First National Bank of Gulfport, Miss., *v.* Adams, Revenue Agent (1922), 258 U. S. 362, 66 L. Ed. 661, 42 S. Ct. 323, overruling 123 Miss. 279, 85 So. 308.

Section 5219 of the Revised Statutes (Section 548, Title 12, United States Code) provides that:

> "The legislature of each state may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several states may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:
>
> "1. (a) The imposition by any state of any one of the above four forms of taxation shall be in lieu of the others, * * *"

Revised Statute, Section 5219, is set forth in full in "Addendum No. 1" hereto.

**2. The State of Ohio, pursuant to the authority granted by the Federal Statute (R. S., Section 5219), has elected to tax the shares of the stockholders.**

> General Code, Section 5408: "All the shares of the stockholders in an incorporated bank or banking asso-

ciation located in this state, incorporated or organized under the laws of the state or of the United States * * * shall be listed at the true value in money and taxed only in the city, ward or village where such bank is located."—(Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition).

General Code, Section 5408, in full, to Section 5414, inclusive, and General Code 5672 and 5673 (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition), all dealing with the taxation of banks, are set forth in "Addendum No. 2" hereof; and the pertinent tax statutes of Ohio of general application to all property, including bank shares, being General Code, Sections 2583, 2585, 5367 and 5579 (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition), in their pertinent parts, are set forth in "Addendum No. 3" hereof.

The Supreme Court of Ohio held that:

"2. The provisions of Section 5672, General Code, as in effect prior to January 1, 1931, making the taxes assessed on shares of stock in a bank or banking association a lien on such shares until paid and imposing upon such bank or banking association the duty to collect the taxes due upon its shares of stock from the owners thereof and pay the same to the treasurer of the county in which such bank or banking association is located and imposing upon any bank or banking association failing to pay such taxes a liability by way of penalty for the gross amount of taxes due from all the owners of the shares of stock do not impose a tax on the bank and are not violative of the provisions of Section 548 of Title 12 of the Code of Laws of the United States (Section 5219, Revised Statutes of the United States) prescribing the manner in which such taxes affecting national banks may be levied and assessed."

The Supreme Court of Ohio also held, in paragraph number 3 of the Syllabus, that the tax was placed:

> "on the tax duplicate against the bank instead of the respective owners of the shares of stock"

but that it

> "does not constitute the same a lien on the real estate of the bank."

The Supreme Court of Ohio also held that:

> "4. The apportionment of the aggregate amount of taxes due on bank shares among the respective owners thereof is not a prerequisite to the enforcement of the liability of a bank to collect the taxes due upon its shares of stock and pay same to the treasurer of the county by the provisions of Section 5672, General Code."

**3. Questions presented on this appeal.**

There is thus drawn in question:

A. *The validity of the Bank Tax Statutes of Ohio, as applied by the County Auditor and County Treasurer and as construed by the Supreme Court of Ohio, under the claim that the same are contrary to and in violation of Section 5219, Revised Statutes of the United States, and Section 1 of the Fourteenth Amendment to the Constitution of the United States.* And the decision of the Supreme Court of Ohio sustained the Ohio Statute as construed by the County Auditor and the County Treasurer.

B. *And there is also involved in this appeal the validity of the taxes found by the Supreme Court of Ohio to be assessed against Appellant instead of against the stockholders of Appellant on the value of their shares.*

And these questions involved in this appeal are not solely the validity of taxes or tax assessments but also the validity

of the Ohio Statute under authority of which the County Auditor pretended to act. Those questions were presented in the Court of Common Pleas, the trial court, and also in the Court of Appeals and in the Supreme Court of Ohio, and are now raised in this case on appeal.

**4. Jurisdiction of this Court to entertain this appeal.**

A. *Jurisdiction to entertain an appeal from the decision of a state court on the ground that a State Statute, as construed, is repugnant to the Constitution of the United States. Colorado National Bank of Denver* v. *Bedford* (1940), 310 U. S. 41. The language of the Syllabus in that case is as follows:

> "1. This case is appealable under Judicial Code, Section 237(a) because a state statute affecting national banks was upheld by a state court over the objection of conflict with the Federal Law and Constitution."

To the same effect, see *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664.

In the case of *Indiana, Ex Rel., Anderson* v. *Brand, Trustee*, (1938), 303 U. S. 98, this Court held as follows:

> "1. Where a state court does not decide a cause upon an independent state ground but deeming a Federal question to be before it actually entertains and decides that question adversely to the Federal right asserted, this court has jurisdiction to review the judgment if final."

This Court has also held that:

> "In the exercise of the appellate jurisdiction of the Federal Supreme Court over state courts, the former court is bound by the construction of a state law adopted by its court of last resort. But the Federal Supreme Court, while bound by the construction of a state statute adopted by the state court of last resort,

is not concluded by its reasoning but must exercise independent judgment when called upon to determine the Federal question whether the action, as construed and applied, is repugnant to the restrictions of the Federal Constitution."—Ward *v.* Krinsky (1922), 259 U. S. 502, 42 S. Ct. 529, 66 L. Ed. 1033, 28 A. L. R. 1207.

"Where the validity of a statute of California, as construed by the California courts, was drawn in question on the ground of its being repugnant to the Constitution of the United States, a judgment of the Supreme Court of California was properly before the United States Supreme Court on appeal."—Standard Oil Company of California *v.* Johnson (1942), 62 S. Ct. 1168, 86 L. Ed. 1611.

"The United States Supreme Court, in passing on constitutional questions regards substance and the statute attacked must be tested by its operation and effect."—Near *v.* The State of Minnesota (1931), 283 U. S. 697, 51 S. Ct. 625, 75 L. Ed. 1357.

B. *Jurisdiction to entertain an appeal from the decision of a state court on the ground that a State Statute, as construed, is repugnant to a Statute of the United States.*

"The United States Supreme Court had jurisdiction of writ of error to review a suit in the state court where the validity of a state statute providing for a tax on national bank shares is drawn in question as being repugnant to Section 548 of Title 12, United States Code (Revised Statutes, Section 5219)."—*First National Bank of Guthrie* v. *Anderson* (1926), 269 U. S. 341, 46 S. Ct. 135, 70 L. Ed. 295.

Characterization of a tax by a state court is not binding where a Federal right is concerned.—*Carpenter* v. *Shaw*, 280 U. S. 363, 50 S. Ct. 121, 74 L. Ed. 478.

Appeal may be had to the Supreme Court of the United States where a state statute, as construed and applied to a particular transaction, is repugnant to the Constitution or Laws of the United States.—*Dahnke-Walker Co.* v. *Bondurant* (1921, 257 U. S. 282, 42 S. Ct. 106, 66 L. Ed. 239.

Appellate jurisdiction of the United States Supreme Court has been invoked and exercised for the protection of a Federal claim of right under the Statutes of the United States, such as the National Banking Law.—*McCormick* v. *Market Bank* (1897), 165 U. S. 338, 17 S. Ct. 433, 41 L. Ed. 817.

**5. Various contentions of appellees answered.**

A. *Bank Tax Statutes of Ohio have been amended.*

While it is true that the Ohio Bank Tax Statutes involved in this case have been amended, yet they still provide for the taxation of bank shares under the designation of:

> "Investments * * * and other intangible property"—General Code, Section 5328-1 (Throckmorton's Ohio Code Annotated, 1940, Baldwin's Certified Revision).

The case of *District of Columbia* v. *Sweeney*, 310 U. S. 631, cited by Appellees as authority for the proposition that this Court will not entertain jurisdiction because the Statutes in question have been amended is not applicable to the circumstances in this case because the Statute in question in that case had been repealed and was not of public importance and of the great general interest which attaches to statutes affecting the taxation of national banks. In this connection it should also be noted that twenty-nine states, including Ohio, still have statutes authorizing the taxation of national bank shares.

B. *Claim that "Federal questions presented by the pleadings are not open to consideration by this Court."*

This claim has been answered above, but at this point it is sufficient to say that this Court, comparatively recently, held to the contrary in the case of *Colorado National Bank*

*of Denver* v. *Bedford*, 310 U. S. 41 (*supra*), in which case this Court held, as stated in the Syllabus:

> "1. This case is appealable under Judicial Code, Section 237(a) because a state statute affecting national banks was upheld by a state court over the objection of conflict with the Federal law and the Constitution."

That is precisely the situation presented by the record in this case.

C. *Appellees' argument concerning allegation of discriminatory taxation.*

Much of the argument contained on pages 5, 6, 7, 8, 9 and 10 of Appellees' Brief relates to the allegation of the Third Amended Petition concerning discriminatory taxation, but no evidence was introduced under that allegation and, therefore, the same has never been an issue in any one of the three state courts and, of course, is not an issue in this Court.

D. *Claim of "no substantial Federal question."*

Appellees claim that

> "no substantial Federal question is tendered by this appeal."

The question tendered by this appeal may be stated in a number of different ways, but, in essence, it is whether a State Statute of Ohio, construed by the Supreme Court of that state, to authorize the assessment of a tax in solido in the name of and against a national bank, based upon the bank's net capital, surplus and undivided profits, excluding its real estate, is authorized by the Federal Statute (Section 5219, Revised Statutes); and whether a duty can lawfully be imposed upon such bank to collect undetermined

amounts from its shareholders equal to the total tax assessed in solido against the bank and pay the same to the treasurer of the county in which the bank is located; and whether, if the bank fails to collect such tax so assessed against it, it then becomes liable by way of penalty imposed by the State Statute to pay the gross amount of said tax so assessed plus $100.00 a day penalty for delay in such payment.

These are the questions presented by the decision of the Supreme Court of Ohio from which this appeal is prosecuted and we believe the same are, from their very nature, Federal questions of substance, not only of vital interest to the litigants in this case, but equally of interest to national banks and state taxing authorities in all of those twenty-nine states which now tax the shares of national banks.

We believe that the questions here presented are substantial particularly because Section 5219, Revised Statutes, was amended in 1923, completely re-arranged in form to include the substance of the original statute and previous amendments thereof, plus many, but not all, interpretations placed thereon by this Court down through the intervening years, and amended again in 1926; and because since these radical changes of form in the statute by the amendments of 1923 and 1926 there have been but very few decisions of this Court applying such statute as so amended.

For these reasons we believe the record does present on this appeal Federal questions of real substance which should be decided by this Court as a guide for national banks and state taxing authorities in the twenty-nine states that tax the shares of national banks.

In this connection the case of *Owensboro National Bank* v. *Owensboro* (1899), 173 U. S. 664, is most pertinent, as is also the case of *First National Bank of Gulfport, Missis-*

*sippi*, v. *Adams, Revenue Agent* (1922), 258 U. S. 362, in which case it is held that:

> "1. Where the validity of a tax assessment by state officers is properly challenged and the matter comes before the Federal Supreme Court, that Court must determine the effect of the thing actually done. What might have been done under the local statute is not controlling.
>
> "2. A state tax assessed to a national bank, measured by the value of the bank's capital stock, surplus, undivided profits and other personal property, is not equivalent to one upon the shareholders in respect of their shares, and such tax is, therefore, invalid under United States Revised Statutes, Section 5219 (Title 12, Section 548, United States Code) which only permits the state, when assessing taxes, to include national bank shares in the valuation of the personal property of the owner or holder."

E. *Appellees claim "the bank's capital, surplus and undivided profits were a factor in determining the amount of the taxes."* (Page 11, Appellees Brief.)

The appellees' contention that the capital, surplus and undivided profits of the bank were only a factor in determining the amount of the taxes is answered by the testimony of one of the Appellees, E. E. Taylor, County Auditor, who testified as follows:

> "Q. While we are waiting, I might ask this, Mr. Taylor: The taxes which these records of your tax lists for the years in question show as having been assessed in the name of The Second National Bank of St. Clairsville were arrived at by multiplying the valuation, the ultimate valuation, by the tax rate for that particular year in question in the village of St. Clairsville, Ohio. Is that correct?
>
> * * * * * * *

"Court: All right, you may answer that.
"A. Yes, sir.
"Mr. Sedgwick: Exception.
"Q. That is the way the tax was arrived at?
"A. Sure.'"—(R. page ——.)

Appellees, on page 10 of their Brief, cite the case of *Des Moines National Bank* v. *Fairweather*, 263 U. S. 103 at 105, to the effect that such testimony:

> "does not even give color to the contention that a tax so based is a tax on the property of the bank."

The distinguishing feature, however, between that case and the case at bar is that the assessments in that case were lawfully made against the shareholders with respect to their shares and, of course, the same did not constitute a tax against the bank with respect to the bank's property.

F. *Decision of Ohio Supreme Court based on the case of First National Bank of Aberdeen* v. *Chehalis County (1897), 166 U. S. 440.*

The Supreme Court of Ohio based its decision upon the last above-mentioned case but in so doing it overlooked the fact that in that case there were two statutes of the state of Washington involved, Section 21 and Section 23 of the Laws of Washington. Section 21 provided, in its pertinent parts, that:

> "Every • • • corporation • • • carrying on a general banking business in this state, whether the same has been organized under the banking laws of this state or the United States, • • • shall be assessed and taxed in the county • • • where such bank • • • is located, and not elsewhere, in the following manner: Annually at such times as provided for listing property for taxation every such bank • • • shall, by its accounting officer, furnish the county • • • assessor a statement verified by

oath, giving the amount of paid up capital stock, the amount of surplus or reserved fund and the amount of undivided profits of such bank * * *. The aggregate amount of capital, surplus and undivided profits shall be assessed and taxed as other like property in the state is assessed and taxed * * *."

The comment of the Court upon this section was that:

> "If this section stood alone, there might be ground for the contention that it contemplates taxation of the capital of the bank. But Section 23 of the Statutes provides that 'each bank and banking association shall be liable to pay any taxes assessed against them *as the agent of each of its shareholders, owners or owner,* under the provisions of this Act and may pay the same out of their individual profit account or charge the same to their expense account or to the accounts of such shareholders, owners or owner in proportion to their ownership.'" (Italics ours.)

This, of course, is a vastly different situation from that presented by the case at bar. Section 23 of the Statutes of Washington authorized the assessment to be made on the bank's capital, surplus and undivided profits in the name of the bank; but, by Section 23 of the Act, it provided that such an assessment is made in the name of the bank:

> "as the agent of each of its shareholders."

The Ohio Statutes, on the contrary, contain no provision authorizing the assessment of the tax in the name of and against the Bank. The only tax authorized by the Ohio Statutes is a tax on:

> "the shares of the stockholders";

consequently, the Supreme Court of Ohio was in error in holding that the case of *First National Bank of Aberdeen* v. *Chehalis County,* 166 U. S. 440, is decisive of the issues in this case.

Perhaps the fact that Section 5219, Revised Statutes, has been changed in form, although not in substance, since the decisions in the cases of *Owensboro National Bank* v. *Owensboro* (1899), 173 U. S. 664 (supra), and *First National Bank of Gulfport, Miss.*, v. *Adams, Revenue Agent,* (1922), 258 U. S. 362 (supra), led the Supreme Court of Ohio to ignore the holdings in the cases last above cited.

We believe the true rule applicable here is that stated by this Court in the case of *Schuylkill Trust Co.* v. *Pennsylvania,* (1935), 296 U. S. 102, in which case it was held, to quote from the Syllabus:

> "1. A corporation made liable in the first instance for a state tax on its shares which it may pay from its funds or collect from the shareholders but for which no lien is given either to the corporation or to the state has a standing to contest the validity of the tax.
>
> "2. Much weight attaches to the characterization of a state tax or the interpretation of a state law by the State Supreme Court, but where a Federal question is involved, this Court must determine for itself the true nature of the tax by ascertaining its operation and effect."

G. *Appellees' contention that Congress intended assessment of tax against the Bank "as agent of its shareholders."*

The argument is made that because this Court has held that Congress did not intend by the provisions of Revised Statutes, Section 5219, to prescribe to the states the method by which the tax should be collected (see *First National Bank* v. *Kentucky,* 76 U. S. 353 at 363; *Tappan* v. *Merchants National Bank,* 86 U. S. 490 at 505) or the place where the tax should be imposed (*Covington* v. *First National Bank,* 198 U. S. 100 at 112) or the method of collection and the appointment of the Bank as agent to return the shares of the shareholders for taxation and, as agent, to collect the

tax; that, therefore, the Statute authorized the states to make the Bank the agent of the shareholders for assessment of the taxes as well.

This, we submit, is an erroneous conclusion because if such had been the intention of Congress, it would have amended Revised Statutes, Section 5219, in 1923 and 1926 to unequivocally express such an intention. The Supreme Court of the United States had, years ago, held, in the case of *First National Bank of Aberdeen* v. *Chehalis County* (1897), 166 U. S. 440, that a state statute which made the bank the agent of the stockholders for assessment of a tax in the bank's name was legal; yet, notwithstanding that fact, when Congress amended Revised Statutes, Section 5219, it did not include such a provision and certainly the Statutes of Ohio enacted pursuant to the authority of Revised Statutes, Section 5219, do not include such a provision. There being no such provision in the State Law of Ohio, the Supreme Court of Ohio was in error in relying upon the authority of the case of *First National Bank of Aberdeen* v. *Chehalis County* (supra) and this, of course, presents a federal question not only of substance and of the nature which this Court is authorized to take jurisdiction but one which this Court should decide in the interest of the national banks and state taxing authorities in the twenty-nine states which tax the shares of national banks.

In summary, it should be said that the questions here presented not only deal with the validity of the tax and its assessment, but also raise and deal with the question of the validity of the State Statute of Ohio under which the tax was assessed because the same, as interpreted and applied, is repugnant to Section 5219 of the Revised Statutes and Section 1 of the Fourteenth Amendment to the Constitution of the United States. It should also be pointed out that the whole policy, as well as the provisions of the laws of Ohio with respect to the assessment of taxes, re-

quire that they be assessed to the owners thereof and such is shown to be the fact by the form used by the County Auditor in assessing the tax, which contains a column headed "owner."

Respectfully submitted,

THORNBURG & LEWIS,
GEORGE THORNBURG,
EARL R. LEWIS,
*Attorneys for Appellant,*
*St. Clairsville, Ohio.*

## ADDENDUM No. 1.

Section 5219, United States Revised Statutes:

"State taxation. The legislature of each state may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several states may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

"1. (a) The imposition by any state of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in sub-division (c) of this clause.

"(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state coming into competition with the business of national banks: *Provided*, that bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed money capital within the meaning of this section.

"(c) In the case of a tax on or according to or measured by the net income of an association, the taxing state may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing state upon mercantile, manufacturing, and business corporations doing business within its limits: *Provided, however*, that a state which imposes a tax on or according to or measured by the net income of, or a franchise or excise

tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other states and also imposes a tax upon the income of individuals, may include in such individual income dividends from national banking associations located within the state on condition that it also includes dividends from domestic corporations and may likewise include dividends from national banking associations located without the state on condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations.

"(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

"2. The shares of any national banking association owned by nonresidents of any state shall be taxed by the taxing district or by the state where the association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such nonresident shareholders.

"3. Nothing herein shall be construed to exempt the real property of associations from taxation in any state or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

"4. The provisions of Section 5219 of the Revised Statutes of the United States as in force prior to March 25, 1926, shall not prevent the legalizing, ratifying, or confirming by the states of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section. (R. S. Sec. 5219; Mar. 4, 1923, c. 267, 42 Stat., 1499; Mar. 25, 1926, c. 88, 44 Stat., 223).

"(R. S. Sec. 5219 from Act June 3, 1864, c. 106, Sec. 41, 13 Stat., 111; Act Feb. 10, 1868, c. 7, 15 Stat., 34)."

## ADDENDUM No. 2.

General Code, Section 5408 to Section 5414, inclusive, and General Code Section 5672 and Section 5673 (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition):

G. C., Section 5408: "*Shares or capital of banks, incorporated or unincorporated.* All the shares of the stockholders in an incorporated bank or banking association, located in this state, incorporated or organized under the laws of the state or of the United States, and all the shares of the stockholders in an unincorporated bank, located in this state, the capital stock of which is divided into shares held by the owners of such banks and the capital employed, or the property representing it, in an unincorporated bank the capital stock of which is not divided into shares, located in this state, shall be listed at the true value in money, and taxed only in the city, ward, or village where such bank is located."

G. C., Section 5409: "*Tax on real estate of bank.* The real estate of a bank or banking association shall be taxed in the place where it is located in like manner as the real estate of persons is taxed."

G. C., Section 5410: "*Names of stockholders and shares of each.* There shall be kept in the office at all times where the business of such bank or banking association is transacted, a full and correct list of the names and residences of the stockholders therein, and the number of shares held by each, which at all times during business hours shall be open to the inspection of all officers who are or may be authorized to list or assess the value of such shares for taxation."

G. C., Section 5411: "*Return made by cashier, etc., to auditor.* The cashier of each incorporated bank, and the cashier, manager or owner of each unincorporated bank, shall return to the auditor of the county in which such bank is located, between the first and second Mondays of May, annually, a report in duplicate under oath, exhibiting in detail, and under appropriate heads,

the resources and liabilities of such bank at the close of business on the Wednesday next preceding the said second Monday, with a full statement of the names and residences of the stockholders therein, the number of shares held by each and the par value of each share, and of the amount of capital employed by unincorporated banks, not divided into shares, and the name, residence and proportional interest of each owner of such bank."

G. C., Section 5412: "*Auditor to fix value of bank shares or property.* Upon receiving such report the county auditor shall fix the total value of the shares of such banks, and the value of the property representing the capital employed by unincorporated banks, the capital stock of which is not divided into shares, each according to their true value in money, and deduct from the aggregate sum so found, of each, the value of the real estate included in the statement of resources as it stands on the duplicate. Thereupon he shall make and transmit to the annual state board of equalization for banks a copy of the report so made by the cashier, manager or owner with the valuation of such shares or property representing capital employed as so fixed by the auditor."

G. C., Section 5413: "*When bank fails to make return.* If a bank fails to make and furnish to the county auditor the statement required, within the time herein fixed, the auditor shall examine the books of the bank; and also any officer or agent thereof under oath, with such other persons as he deems proper, and make such statement. The auditor shall have like powers, and the probate judge of the county shall exercise like powers, and perform like duties in aid of the auditor in the performance of his duties under this section, as are authorized by law in cases where the county auditor is informed, or has reason to believe, that any person has failed to make a return, or has made a false return for taxation. The statement so made out by the auditor shall stand as the statement required to be made by the cashier."

G. C., Section 5414: "*Penalty for making false return.* A bank officer who fails to make out and furnish to the county auditor the return required by section fifty-four hundred and eleven, or wilfully makes a false statement in such return, shall forfeit not more than one hundred dollars together with the costs and other expenses incurred by the auditor or other proper officer in obtaining such statement."

G. C., Section 5672: "*Tax a lien upon bank shares; collection of tax; penalty.* Taxes assessed on shares of stock, or the value thereof, of a bank or banking association, shall be a lien on such shares from the first Monday of May in each year until they are paid. It shall be the duty of every bank or banking association to collect the taxes due upon its shares of stock from the several owners of such shares, and to pay the same to the treasurer of the county in which such bank or banking association is located, as other taxes are paid, and any bank or banking association failing to pay the said taxes as herein provided, shall be liable by way of penalty for the gross amount of the taxes *due from all the owners of the shares of stock*, and for an additional amount of one hundred dollars for every day of delay in the payment of said taxes."

G. C., Section 5673: "*Banks may deduct taxes paid from shareholders; when; lien.* Such bank or banking association paying to the treasurer of the county in which it is located, the taxes assessed upon its shares, in the hands of its shareholders respectively, as provided in the next preceding section, may deduct the amount thereof from dividends that are due or thereafter become due on such shares, and shall have a lien upon the shares of stock, and on all funds in its possession belonging to such shareholders, or which may at any time come into its possession, for reimbursement of the taxes so paid on account of the several shareholders, with legal interest and such lien may be enforced in any appropriate manner."

## ADDENDUM No. 3.

General Code, Sections 2583, 2585, 5367 and 5579 (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition):

G. C., Section 2583: "On or before the first Monday of August annually, the county auditor shall compile and make up in tabulation form and alphabetical order separate lists of the names of the several persons, companies, firms, partnerships, associations and corporations in whose names real or personal property has been listed in each township, etc. * * * and in a separate list the aggregate value of the personal property as listed therein and revised by him or the county board of revision, as the case may be, * * * If the name of the owner * * * of any item of personal property is unknown, the word 'unknown' shall be entered in the column of names opposite said * * * item. Such lists shall be prepared in duplicate. On or before the first Monday of September in each year, the county auditor shall correct such lists in accordance with the additions and deductions ordered by the Tax Commission of Ohio and by the county board of revision and shall certify and on the first day of October deliver one copy thereof to the county treasurer. The copies prepared by the county auditor shall constitute the auditor's tax list and treasurer's duplicate of real and personal property for the current year * * *."

G. C., Section 2585: "*Tax to be levied on each tract.* After receiving from the auditor of state and from other officers and authorities legally empowered to determine the rates or amounts of taxes to be levied for the various purposes authorized by law, statements of the rates and sums to be levied for the current year, the county auditor shall forthwith proceed to determine the sums to be levied upon each tract and lot of real property, adding the taxes of any previous year that have been omitted, and upon the amount of personal property, moneys and credits listed in the county, in the

name of each person, company, or corporation which shall be assessed equally on all real or personal property subject to such taxes, and entered in one or more columns, in such manner and form as the auditor of state prescribes."

G. C., Section 5367: "Each county is hereby made the unit for the listing and assessing of personal property, moneys, credits, investments in bonds, stocks, joint stock companies or otherwise for taxation purposes. The county auditor, in addition to his other duties, shall be the assessor for and shall list and value for taxation all such property within his county * * *."

G. C., Section 5579: "*Tax Commission shall direct and supervise assessment of property.* In addition to all other powers and duties vested in or imposed upon it by law, the Tax Commission of Ohio shall direct and supervise the assessment for taxation of all real and personal property in the state. County auditors shall, under the direction and supervision of the Tax Commission of Ohio, be the chief assessing officers of their respective counties, and shall list and value real and personal property for taxation, within and for their respective counties, except as may be otherwise provided by law. There shall also be in each county, a board to hear complaints and revise assessments of real and personal property for taxation, which shall be known as the county board of revision."

OCT 11 1943
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1943**

---

# No. 421

---

THE SECOND NATIONAL BANK OF ST. CLAIRSVILLE, OHIO,

*Appellant,*

*vs.*

HOMER J. FINDLEY, AS TREASURER OF BELMONT COUNTY, OHIO, AND E. E. TAYLOR, AS AUDITOR OF BELMONT COUNTY, OHIO.

---

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO.

---

## STATEMENT OPPOSING JURISDICTION.

---

ROSS MICHENER,
*Prosecuting Attorney,*
*Belmont County, Ohio;*
A. G. LANCIONE,
*Ass't Prosecuting Attorney,*
*Belmont County, Ohio;*
C. C. SEDGWICH,
*Ass't Prosecuting Attorney,*
*Belmont County, Ohio,*
*Counsel for Appellees.*

# INDEX.

## Subject Index.


| | Page |
|---|---|
| Statement opposing jurisdiction | 1 |
| Summary of argument in opposition to the appeal | 1 |
| Introduction to argument | 2 |
| Argument in opposition to taking jurisdiction | 4 |
| The Ohio statutes involved were substantially amended during the course of this litigation | 4 |
| All claims of discrimination having been abandoned by appellant, federal questions presented by the pleadings are not open to consideration by this Court | 5 |
| No substantial federal question is tendered by this appeal. The asserted right denied is not real | 10 |
| The judgment of which review is sought is not in conflict with any pronouncement of this Court | 15 |
| Conclusion | 17 |


## Table of Cases Cited.


| | |
|---|---|
| *Ballard* v. *Hunter*, 204 U. S. 241 | 14 |
| *Baltimore National Bank* v. *State Tax Commission*, 297 U. S. 209 | 13 |
| *Corliss* v. *Bowers*, 281 U. S. 376 | 14 |
| *Covington* v. *First National Bank*, 198 U. S. 100 | 13 |
| *Davenport National Bank* v. *Board of Equalization*, 123 U. S. 83 | 13 |
| *Des Moines National Bank* v. *Fairweather*, 263 U. S. 103 | 11,15,16,18 |
| *District of Columbia* v. *Sweeney*, 310 U. S. 631 | 5 |
| *Findley, Treas.* v. *Odland, Receiver*, 127 Fed (2) 948 | 18 |
| *First National Bank* v. *Chapman*, 173 U. S. 205 | 15 |
| *First National Bank* v. *Chehalis County*, 166 U. S. 440 | 13 |
| *First National Bank* v. *Kentucky*, 76 U. S. 353 | 12,13 |
| *First National Bank of Aberdeen* v. *Chehalis County*, 166 U. S. 440 | 11,15,16 |

Page

*First National Bank of Gulfport* v. *Adams*, 258 U. S. 362, 4,10,15
*Gager, Treas.* v. *Prout*, 48 O. S. 89 ..... 14
*Gully* v. *First National Bank of Meridian*, 299 U. S. 109. 14
*Hoenig, Treas.* v. *Huntington National Bank*, 59 Fed. (2d) 479, 45 Fed. (2d) 213, 287 U. S. 648 ..... 9
*Home Savings Bank* v. *Des Moines*, 205 U. S. 503 ..... 11
*Howk* v. *Krotzer*, 140 O. S. 100 ..... 9
*Jett Bro. Distilling Co.* v. *Carrolton*, 252 U. S. 1 ..... 14
*Lionberger* v. *Rouse*, 76 U. S. 468 ..... 15
*Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 649 ..... 15
*Merchants, etc., National Bank* v. *Pennsylvania*, 167 U. S. 461 ..... 15
*New Orleans* v. *Stempel*, 175 U. S. 309 ..... 14
*Owensboro National Bank* v. *Owensboro*, 173 U. S. 664 .. 4,10
*Tappan* v. *Merchants National Bank*, 86 U. S. 490 .... 12
*Tradesman National Bank* v. *Oklahoma Tax Comm.*, 309 U. S. 560 ..... 12
*Union Savings Bank* v. *Pancoast, Treasurer*, 142 Ohio State 6 ..... 2

STATUTES CITED

Act of June 3, 1864:
Section 40 (13 U. S. St. at L. 99) ..... 12
Section 41 (13 U. S. St. at L. 99, 112) ..... 12
Constitution of Ohio, Article XII, Section 2 ..... 4
General Code of Ohio:
Section 5393 ..... 18
Section 5410 ..... 5
Section 5411 ..... 5,18
Section 5412 ..... 18
Section 5591 ..... 18
Section 5672 ..... 11
Section 5673 ..... 11
Judicial Code, Section 237a ..... 14
Revised Statutes, Section 5219 (42 Stat. at L. 1499), 12,13,16,17
United States Code, Title 12:
Section 62 ..... 12
Section 548, as amended by the Act of March 25, 1926 (44 Stat. at L. 223, c. 88) ..... 2,3,12,18

# IN THE SUPREME COURT OF THE STATE OF OHIO

**Cause No. 29198**

THE SECOND NATIONAL BANK OF ST. CLAIRSVILLE, OHIO,

*Plaintiff-Appellee,*

*vs.*

HOMER J. FINDLEY, AS TREASURER OF BELMONT COUNTY, OHIO, AND E. E. TAYLOR, AS AUDITOR OF BELMONT COUNTY, OHIO,

*Defendants-Appellants.*

## BRIEF IN OPPOSITION TO THE APPEAL TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

### Summary of Argument in Opposition to the Appeal.

I. Each of the Ohio statutes involved in this litigation has been substantially amended pursuant to the 1929 amendment to the Constitution of Ohio, which completely revamped the system (effective January 1, 1931) of taxing personal property within the state. Questions arising under laws no longer in effect are not of sufficient public importance to require the consideration of this court.

II. All elements of alleged discrimination claimed in the pleadings to conflict with either the constitution or statutes of the United States were abandoned by appellant before

the case reached the Supreme Court of Ohio. Consequently, the only federal questions of substance presented by the pleadings do not merit consideration. They are now beyond review by this court.

III. The federal question, if any is tendered by this appeal, is not substantial. Moreover the asserted denial of any right or privilege accruing under favor of either the Constitution or statutes of the United States is more fanciful than real.

IV. The determination of the Ohio Supreme Court that the statutes of Ohio imposing the taxes in question are not violative of section 548, title 12, United States Code, is not in conflict with any determination of this court.

**Introduction to Argument.**

An appeal is prosecuted from a judgment of the Supreme Court of Ohio, rendered June 30, 1943, reversing in part and affirming in part a decree of the Court of Appeals for the Seventh District of Ohio, within and for Belmont County, which enjoined the collection of taxes on the bank's shares of stock. The opinion of the court is reported under the title of *Union Savings Bank* v. *Pancoast, Treasurer,* in 142 Ohio State, 6.

The parties appeared in the Ohio court as in the above caption. They occupy the reverse of that position with respect to this appeal and are herein designated as they appear in this court.

Having stated the question presented in each of the three cases decided as being:

> Were the taxes in question assessed on the shares of stock of the several banks or upon the property of the banks?

the Supreme Court of Ohio construed the Ohio taxation statutes applicable alike to state and national banks. By

the judgment from which this appeal is sought it determined that the assailed taxes are imposed upon the shares of the bank and not upon either the bank or its property, that the collective assessment of all the shares and the entry on the tax duplicate, opposite the name of the bank, of the total amount of taxes due on the shares, collectively instead of distributively in the names of the respective owners of the shares, is not violative of Section 548, Title 12, United States Code; that the entry of the levy of taxes on the tax duplicate in the name of the bank does not constitute the same a lien on the real estate of the bank; and that the apportionment of the aggregate amount of taxes due on bank shares among the respective owners thereof is not a prerequisite to the enforcement of the liability of the bank to collect the taxes due upon the shares of stock and pay the same to the treasurer of the county. Accordingly, it was ordered that the judgment of the Court of Appeals "insofar as said decree orders that the pretended liens against the real estate of the appellee, be cancelled of record * * * and insofar as the court renders judgment for appellant on the second cause of action be * * * affirmed and * * * that in all other respects the judgment of the said Court of Appeals be * * * reversed and final judgment rendered in favor of appellants for the reasons stated in the opinion rendered in this case" (Appellant's Statement of Jurisdiction, pp. 15-16, 54-62).

From the foregoing, it clearly appears that the assertions contained in paragraphs designated 5 (2), (3), (5), (6), (7) and (10) of appellant's Petition on Appeal (pages 3-9), Assignment of Errors (pages 1-8) and Statement of Jurisdiction (pages 2-6) to the effect that the taxes in controversy were "assessed against the bank" and that said taxes were assessed "on the net capital, surplus and undivided profits of the bank, excluding real estate" are, and each of them is, unsupported by either the court's judgment

or opinion. They are assertions, not of what the court decided but of what appellants vigorously endeavored to have decided. They spring from the abortive attempt to induce the Ohio court to decide otherwise under the influence of (1899) *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664, and (1922) *First National Bank of Gulfport* v. *Adams*, 258 U. S. 362, cases which the court respectfully considered inapposite. Similarly lacking in sanction are appellant's conclusions that the court's judgment requires the bank "to collect from its individual shareholders undetermined sums", requires the bank "to compute the amount of the taxes due from each shareholder and then to collect the same and pay the amount thereof to the county treasurer", and imposes upon the bank "the obligation to pay the total amount of said taxes * * * by way of penalty * * * before the same become delinquent".

**Argument in Opposition to Taking Jurisdiction.**

*The Ohio Statutes Involved Were Substantially Amended During the Course of This Litigation.*

After the three actions consolidated into the instant case (R., p. 29) had been instituted, each of the Ohio statutes involved herein was substantially amended, pursuant to the 1929 amendment of Article XII, Section 2, of the Constitution of Ohio (effective January 1, 1931). This amendment abrogated the taxation of bank shares and all other personal property at their true value in money and substituted for the uniform rule the taxation of such property according to its classification. The resulting legislation (114 Ohio Laws, 714) abolished the need for and purpose to be served by tax lists or duplicates in the process of collecting taxes on bank shares as well as on other personal property.

The taxes here involved are for the three years next preceding the effective date of these constitutional and statu-

tory amendments. The asserted invalidity of the taxes in controversy having been based upon the manner in which the assessment was entered upon the tax lists and duplicates currently in use and the requirement of such tax rolls having been abolished by the amendatory statutes, the effect of any pronouncement this Court may make in this case would be correspondingly limited. As this Court determined in (1939) *District of Columbia* v. *Sweeney*, 310 U. S. 631, questions arising under actions which have expired or have been repealed are not of sufficient public importance to require the consideration of the court.

## II.

### *All Claims of Discrimination Having Been Abandoned by Appellant, Federal Questions Presented by the Pleadings Are Not Open to Consideration by This Court.*

Appellant having recited in its Statement of Jurisdiction only such parts of the pleadings as give color to the asserted Federal question, a review of its third amended petition (R., pp. 1-13) is pertinent. Scrutiny of it will reveal that the only Federal questions of substance presented by the pleadings were abandoned before the case reached the Supreme Court of Ohio.

The initial allegation of the third amended petition is that appellant prosecutes the suit "in its own behalf and for and on behalf of its stockholders having a common interest with it." Next after reciting its corporate and business status under Federal statutes, the capacity of defendants, its compliance with the requirement of section 5410, General Code of Ohio (cf. 12 U. S. C., sec. 62) by keeping open for inspection a list of the names, residences and shares of its stockholders, that it had made on behalf of its shareholders the annual tax returns as required by section 5411, General Code of Ohio, and the amount of its capital

stock, surplus and undivided profits, after deducting the value of its real estate as shown by said reports, appellant alleged:

> "The said auditor * * * attempted to impose upon plaintiff, by levying and assessing against plaintiff" * * * the said taxes, "which amounts were * * * placed against plaintiff upon the tax duplicates"; that the auditor "did not * * * list nor assess against the owners of the shares * * * taxes upon their respective shares in any amount * * *, and did not * * * place on said tax duplicates * * * the value of the shares of capital stock of plaintiff in the names of the respective owners of such shares of stock"; that "defendants filed said pretended assessments and pretended levy in the office of the recorder * * * for a lien against * * * real estate standing of record in the name of plaintiff"; and that "by reason of the foregoing the pretended assessment of said taxes against plaintiff by said auditor of said Belmont county, Ohio, and threatened collection thereof from plaintiff by said treasurer of Belmont county, Ohio, are and at all times herein stated were, contrary to law and in violation of plaintiff's legal and constitutional rights in the following respects, to wit:
>
> "(a) There is no statute of Ohio nor of the United States of America authorizing or permitting the auditor to make said assessments of taxes against plaintiff.
>
> "(b) Said taxes were assessed against plaintiff at a greater rate than was assessed upon other monied capital, which during all the times mentioned herein came into actual and direct competition in substantial amounts with the business of plaintiff and of the other national banks of Belmont county, Ohio, contrary to and in violation of section 5219 of the Revised Statutes of the United States of America, now Section 548 of Title 12 of the United States Code and in violation of Section 1 of the Fourteenth Amendment to the Consti-

tution of the United States of America and also in violation of Section 2 of Article 12 of the Constitution of Ohio in effect prior to January 1, 1931.

"(c) The statutes of Ohio under authority of which said auditor and treasurer pretend to have assessed said taxes against plaintiff and to have the right to collect the same from plaintiff, respectively, are in violation of Section 5219 of the Revised Statutes of the United States of America now Section 548 of Title 12 of the United States Code and also in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States of America and also in violation of Section 2 of Article 12 of the Constitution of Ohio in effect prior to January, 1931, because the same authorize the taxation of the shares of plaintiff and all other national banks of Belmont county at their true value in money without deductions of any kind whatsoever, except as to real estate, while allowing deductions of the debts of the shareholders from the value of shares of building and loan companies and associations directly competing with the business of plaintiff and of said other national banks, and, under certain circumstances, exempt such shares entirely from taxation as hereinbefore set forth, thus discriminating against the monied capital and shares of capital stock of national banks by authorizing the taxing of the same at a greater rate than is assessed upon such other monied capital coming into actual and direct competition in substantial amounts with the business of plaintiff and the other national banks in Belmont county, Ohio."

"Wherefore plaintiff prays that all said pretended taxes levied and assessed against the plaintiff for the years aforesaid be declared, adjudged and decreed to be discriminatory, invalid, illegal and void; that any purported lien upon the property of plaintiff by reason thereof or arising therefrom be decreed to be void and of no effect; that defendants and their respective successors in office be enjoined from collecting or attempt-

ing to collect from plaintiff the said taxes levied and assessed during the years 1928, 1929 and 1930; that pending the determination of this action a temporary restraining order be issued forbidding any action upon the part of defendants in collecting said taxes or assessing any penalties for the failure to pay said taxes and that upon final hearing said restraining order be made permanent and that plaintiff have such other and further relief as is proper."

"Plaintiff further prays that the defendant treasurer of said county be required and ordered to return to plaintiff the amount of taxes so paid by it under protest and mistake of law and facts, to wit, the sum of $6,575.30 paid in the year 1927 for the year 1926 and the sum of $7,294.08 paid in the year 1928 for the year 1927, for which separate amounts plaintiff prays judgment against said defendant treasurer of said county."

The foregoing paragraphs designated (b) and (c) relate to the averment that "the monied capital of building and loan companies and associations in Belmont county came into actual and direct competition with the business of plaintiff and the other national banks in Belmont county, Ohio, and such competition during each of said years was substantial in amount and as hereinafter set forth in part, to wit:" Then follows a detailed comparison of appellant, all national banks and all building and loan associations in Belmont county, with respect to the total of monied capital in each represented by: (a) capital, surplus and undivided profits, (b) deposits, (c) loans upon the security of real estate, and (d) loans upon the security of collateral; but there is absent any suggestion that one of the mentioned financial institutions exists in the taxing district in which appellant bank is located. Evidence in support of either competition or discrimination was not tendered and the claims of appellant with respect thereto were abandoned (R., 32-33), as conceded in its Statement of Jurisdiction (p. 12).

As indicated in the prayer, recovery of taxes for the years 1926 and 1927 was sought in second cause of action, wherein the allegations of the first cause were adopted and wherein appellant further alleged that it paid under protest and under mistake of law and fact "taxes pretended to have been levied and assessed * * * upon its capital, surplus and undivided profits after deducting therefrom the value of its real estate." On this issue the judgment went against appellant in both lower courts (R., pp. 34, 48) and, as conceded by appellant (Statement of Jurisdiction, p. 12) it was not before the Supreme Court of Ohio in consequence of appellant's omission to prosecute a cross appeal (*Howk* v. *Krotzer*, 140 O. S. 100).

The second cause of action and the final adjudication against appellant upon it are of significance in another respect. As stated in the Ohio court's opinion (142 O. S., 6, 10) one of the defenses was that "there has been an established practice during these years of so recording the assessments in the name of the bank rather than the individual owners," which appellant had paid "from 1912 to 1928, without protest." Appellant asserted in the second cause of action that taxes for the years 1926 and 1927 were assessed and entered upon the duplicates in the same manner as the taxes in controversy.

The anomaly apparent in the third amended petition of alleging discrimination in the assessment as between banks and other financial institutions, which could exist only if the assailed taxes were imposed upon appellant's shares, and alleging that the taxes were imposed upon the bank's capital, resulted from developments in litigation, the pleadings in which were the pattern for the initial petition (R., pp., 189-193) of banks (12 national, one state) in Belmont county, including appellant. As in *Hoenig, Treas.* v. *Huntington National Bank*, 59 Fed. (2d) 479, reversing 45 Fed. (2d) 213, certiorari to which was denied (287 U. S. 648),

the alleged invalidity of the taxes, conceded to be on the shares, was due solely to asserted discrimination as compared to money invested in institutions other than banks (R., pp., 189-201), of which only shareholders could complain. The Court of Appeals, Sixth Circuit, having held that competition violative of paramount federal law, between national banks, state banks, building and loan associations or other financial institutions in Ohio, could not exist, the sole ground of the discrimination originally asserted was cut from under the actions. Accordingly, appellant eliminated from its three amended petitions (DX G, R., p. 202; DX H, R., p. 212; DX I, R., p. 221) the allegation that it "has acted and is acting as the agent of its several stockholders in the payment of the taxes complained against," the allegation that "this suit is prosecuted by this plaintiff on its own behalf and for and on behalf of its stockholders," the allegation that the taxes were "assessed against the shareholders of this plaintiff by virtue of their ownership of such shares but in a lump sum to be paid by it," and the representation that the taxes were "levied and assessed against the shares of this plaintiff." Grossly inconsistent therewith, it asserted in the third amended petition that the property of the bank, and not the shares of the stockholders, were the subject of the assessment.

## III.

### *No Substantial Federal Question Is Tendered By This Appeal. The Asserted Right Denied Is Not Real.*

The record in this case clearly shows that appellant's case centralizes upon the contention that the taxes in controversy are imposed upon the bank's property, contrary to the pronouncements of this Court in (1899) *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664, and (1922) *First National Bank of Gulfport* v. *Adams*, 258 U. S. 363,

because, so appellant insists, (1) the bank's capital, surplus and undivided profits were a factor in determining the amount of the taxes, and (2) the assessment was entered on the tax duplicates collectively opposite the name of the bank, instead of distributively in the names of the several shareholders. In (1923) *Des Moines National Bank* v. *Fairweather*, 263 U. S. 103, 105, this court determined that "the fact that the capital, surplus and undivided earnings are made the measure of the value of the shares" does not give even "color to the contention," and by the judgment of which review is sought it was determined that omission to apportion the amount of the taxes among the several shareholders and to so enter the same upon the tax rolls did not convert a valid assessment of the shares into an invalid assessment of the bank's property. In so holding the Ohio Supreme Court relied upon *First National Bank of Aberdeen* v. *Chehalis County*, 166 U. S. 440, decided in 1897, prior to the enactment of sections 5672 and 5673 of the Ohio General Code (102 Ohio Laws, 91) in the form applicable to the instant controversy. As declared in *Home Savings Bank* v. *Des Moines*, 205 U. S. 503, 510, a purpose to tax a bank as distinguished from its shares "against common justice and of doubtful constitutionality ought not to be attributed to the law if any other fair construction is possible."

The purpose of the federal statute as well as its history convincingly disclose the error in assuming that the act of Congress prescribes the method by which the authorized taxes should be assessed, the manner in which they should be entered upon the tax records and the means by which they should be collected. That it did not do, and was not intended to do, either of these things is apparent from the provisions of the act itself and from the cases construing it.

"A consideration of the course of judicial decision on Rev. Stat. sec. 5219 and its predecessors can leave no

doubt that the various restrictions it (Congress) placed on the permitted methods of taxation are designed to prohibit only those systems of state taxation which discriminate in practical operation against national banking associations or their shareholders as a class," and the judicial decisions interpreting them evince "the same purpose to prevent actual discrimination but to allow the states considerable freedom in working out an equitable tax system." *Tradesman National Bank* v. *Oklahoma Tax Com.*, 309 U. S. 560.

The genesis of Title 12, U. S. C., Section 548, as amended by the act of March 25, 1926 (44 Stat. at L., 223, c. 88), authorizing state taxation of national banks was Section 41 of the act of June 3, 1864 (13 U. S. Stat. at L., 99, 112), which became Section 5219 of the Revised Statutes. The initial provision of the statute is that "the Legislature of each state may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits." Its concluding provision that "Section 5219 of the Revised Statutes of the United States as in force prior to March 25, 1926, shall not prevent the legalizing by the states of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collection thereof, to the extent that such tax would be valid under said section" strongly indicates an intention to facilitate both assessment and collection of taxes on shares.

Assessment at the source having been made possible by Section 40 of the Act of June 3, 1864 (13 U. S. St. at L., 99), which became R. S. 5210 and Section 62, Title 12, U. S. C., this court held, in *First National Bank* v. *Kentucky*, 76 U. S. (9 Wall.) 353, 363, that Congress "did not intend to prescribe to the states the method in which the tax should be collected." In *Tappan* v. *Merchants National Bank*, 86 U. S. (19 Wall.) 490, 505, it was declared that "uniformity in the assessment is all that it (the Federal

Constitution) demands" and that "when assessed, the tax may be collected in the manner the (state) law shall provide, and this may be varied to suit the necessities of each case." In *Davenport National Bank* v. *Board of Equalization*, 123 U. S. 83, 85, the court concluded that "the manner of assessing and collecting all taxes by the states is uncontrolled by the act of Congress," and in *First National Bank* v. *Chehalis County*, 166 U. S. 440, 444, held that a state statute which requires assessment of shares collectively to the bank, is not repugnant to any federal restriction.

As was declared in *Covington* v. *First National Bank*, 198 U. S. 100, at 112, "Section 5219, Rev. Stat., authorizes the state to tax all the shares of a national banking association, including those owned by nonresidents, as well as those owned in the state, in the city or town where the bank located; * * *. And this statute is express authority to the state by appropriate legislation to make the bank the agent of the shareholders for the purpose of returning the shares and paying the taxes thereon." By the 1923 amendment of R. S. 5219 (42 Stat. at L., 1499), expressly requiring that the bank "shall make return of such shares and pay the tax thereon as agent of nonresident shareholders," Congress not only removed all lurking doubt whether the state could lawfully impose on a bank the obligation to return the shares for taxation and to pay the taxes thereon with respect to shares held by nonresidents but also sanctioned, if it did not command, to the end of uniformity, and as an implied condition on the conferred power of "taxing all the shares" (Compare: *Baltimore National Bank* v. *State Tax Commission*, 297 U. S. 209), that the state require the bank to serve as the agent of all shareholders with respect to both assessment and payment of the taxes due. Otherwise the purpose of the Constitution of Ohio and of both the Federal Constitution

and statute to prohibit discrimination (*Tradesman National Bank* v. *Oklahoma Tax Commission, supra*) would be frustrated. A similar contemplation of collective assessment at the source and a like intent not to permit evasion are manifest in the 1926 amendment (44 U. S. Stat. at L. 223).

Property need not be assessed to any person or in any name. Taxation being more concerned with control than with the refinements of title (*Corliss* v. *Bowers*, 281 U. S. 376) constitutional safeguards are not infringed if taxes are assessed "without any reference whatever to the name of the owner."

*Ballard* v. *Hunter*, 204 U. S. 241, 256;
*New Orleans* v. *Stempel*, 175 U. S. 309, 311;
*Gager, Treas.* v. *Prout*, 48 O. S. 89, 110.

The record in this case thus discloses that, all questions of discrimination having been eliminated prior to its consideration in the Supreme Court of Ohio, the only real question presented relates to the manner of assessment. As decisions of this court proclaim, this is not a matter of substance and does not involve the validity of a state statute within the meaning of that term as defined in (1919) *Jett Bros. Distilling Company* v. *Carollton*, 252 U. S. 1, 6, and cases there cited. (Compare: *Gully* v. *First National Bank in Meridian*, 299 U. S. 109, 115.)

The decisions of this court "have long since established that an attack upon a tax assessment or levy, on the ground that it infringes a taxpayer's federal rights, privileges or immunities, will not sustain an appeal under #237 (a). (Citations omitted.) It is not enough that an appellant could have launched his attack upon the validity of the statute itself as applied; if he has failed to do so we are without jurisdiction over the appeal. The Judicial Code was intended to restrict our obligatory appellate jurisdiction to a narrow class of cases, and to foreclose an appeal

as of right whenever the prescribed conditions have not been rigorously fulfilled." (1942.) *Memphis Natural Gas Co.* v. *Beeler,* 315 U. S. 649, 650.

## IV.

### *The Judgment of Which Review Is Sought Is Not In Conflict with Any Pronouncement of This Court.*

Unquestioned pronouncements of this court are that if the shares of the bank are assessed and taxed as the property of the shareholders, such tax is not upon the capital of the bank and does not unreasonably burden a federal instrumentality, even though and notwithstanding: the bank is authorized but not required to pay the tax, (*First National Bank* v. *Chapman,* 173 U. S. 205, affirming 56 O. S. 310); or is positively required to pay the tax, (*Lionberger* v. *Rouse,* 76 U. S. (9 Wall.), 468); or is required to "collect and pay" the tax, (*Merchants, etc., National Bank* v. *Pennsylvania,* 167 U. S. 461); or is obliged to pay the tax primarily, absolutely or otherwise. (*First National Bank* v. *Kentucky,* 76 U. S. (9 Wall.), 353; *First National Bank of Aberdeen* v. *Chehalis County,* 166 U. S. 440; *Des Moines National Bank* v. *Fairweather,* 263 U. S. 103.

Conceding that *First National Bank of Aberdeen* v. *Chehalis County,* 166 U. S. 440, is directly contrary to their contentions, appellant misplaces confidence in *First National Bank of Gulfport* v. *Adams,* 258 U. S. 362, as overruling or at least modifying the earlier case. It does neither.

Unlike the case at bar, wherein each assessment is directly responsive to the return of the banks for the current tax year and is clearly identified as being upon shares, the assessment in the *Gulfport* case was additional to taxes paid on returns for prior years and was based upon an order of court directing the taxing authority (whose first judgment vacating the assessment had been reversed, 108

Miss. 346, 66 So. 407), to "assess the * * * bank with capital stock, surplus, undivided profits, and any and all property assessable to said bank, in the sum of $75,150 * * *, which said property was at said time owned by said First National Bank, and which had escaped taxation for each of the years as hereinbefore set out" (258 U. S. 362, at 364). This order of court obviously followed the reversal in 116 Miss. 450, 77 So. 195, of a judgment for the bank, which had been determined by the lower court's finding "that the tax is imposed against it upon its capital stock as such, which the state is without power to do." The Supreme Court of Mississippi affirmed such order in the third appeal of the case (—— Miss. ——, 84 So. 707), notwithstanding the finding of the lower court, and refused to modify its approval on suggestion of error (123 Miss. 279, 85 So. 308).

Confronted with an additional assessment to the bank, "of all other personal property not otherwise mentioned," not based upon any return of the bank but ordered by the lower state court and approved by the state Supreme Court as not in conflict with Section 5219, Revised Statutes of the United States, notwithstanding the provisions of the state statute (abstracted 108 Miss. 346, 66 So. 407), this Court determined only that an assessment not purporting to be made in accordance with the state statute violated the requirement of the paramount act of Congress in the form effective before its amendment in 1923 (42 Stat. at L., 1499, Ch. 267). The judgment of the court below was reversed and, so as to permit reassessment or other process in accordance with state statutes, was "remanded for further proceedings not inconsistent with this opinion." That the pronouncement of this case does not conflict in any respect with that announced in *First National Bank of Aberdeen* v. *Chehalis County*, 166 U. S. 440, witness the reliance upon

both cases in *Des Moines National Bank* v. *Fairweather*, 263 U. S. 103, at 112.

In deciding the latter case, Mr. Justice Van Devanter was conscious that "several important changes" in Section 5219, U. S. R. S., were made by the amendatory Act of March 4, 1923 (42 Stat. at L., 1499, Chap. 267). One of these changes was the elimination of the provision that "nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located." Mistaken interpretation of this proviso as requiring separate entry of proportionate share-taxes on tax records in the name of each shareholder may have induced some states to so prescribe, but more likely they were impelled by advantages accruing to the shareholders from a distributive entry in consequence of allowable deductions to individuals not available otherwise. More important, however, is the fact that in no instance, since *First National Bank of Aberdeen* v. *Chehalis County*, *supra*, was decided (1897) has this court reversed or modified any judgment announcing that an entry on tax records, opposite the name of a national bank, of ad valorem taxes assessed collectively on the shares of the bank, constitutes an assessment of taxes on shares of the bank's stockholders rather than upon any property of the bank.

**Conclusion.**

Treating the papers in this case as an application for a writ of certiorari, the appellant does not make any stronger claim to the exercise of this court's jurisdiction. None of the statutes involved are either doubtful or obscure and every contention made by appellant has been considered and denied by decisions of this court. Assuming, there-

fore, that a Federal question is presented by the record, it is so lacking in substance as not to warrant the court in exercising jurisdiction under section 344 (b), Title 28, United States Code.

As heretofore stated, the Supreme Court of Ohio construed state statutes as not violative of section 548, title 12, United States Code and upheld the validity of the taxes, as did the Circuit Court of Appeals, Sixth Circuit, in (1942) *Findley, Treas.* v. *Odland, Receiver,* 127 Fed. (2d) 948. Regardless whether the questions arising under the state constitution or its statutes so presented were rightly or wrongly determined as conforming to the statutes of Ohio and its constitution, the decision of the state court is controlling here. (*Des Moines National Bank* v. *Fairweather,* 263 U. S. 103, 105.) As construed by the Ohio Supreme Court, the State statutes contemplate that only the bank's shares be assessed, and do not require that the taxes be entered on tax records distributively in the names of the shareholders. In this connection, the state court pointed to the provision of section 5409, Ohio General Code, which requires that the real estate of the bank be assessed separately "in like manner as the real estate of persons is taxed", and had under consideration the certificate of the county official required by sections 5411 and 5412, Ohio General Code to assess the shares of banks "in the aggregate", that "I have fixed the value of the shares of" appellant, appearing on the report of its resources and liabilities. (R. p. 187). Appellant agrees that this "annual report of resources and liabilities" (R. 184-187), on which were based the taxes in controversy, contained the names of the shareholders and the number of shares owned by each; and by sections 5393 and 5591, General Code of Ohio, this report is required to be filed and is made a public record, open to public inspection, so notice to third persons, to the share-

holders and to the bank alike is accomplished. Neither this court nor the Supreme Court of Ohio has observed any provision of the Federal Constitution or statutes prescribing the particular manner of registering assessments on tax rolls for which appellant contends, or any other, as indispensable to the validity of taxes on bank shares, so no right, privilege or immunity vouchsafed by the jurisdiction of this court has been denied.

Respectfully submitted,

Ross Michener,
*Prosecuting Attorney of Belmont County, St. Clairsville, Ohio;*
A. G. Lancione,
*Assistant Prosecuting Attorney of Belmont County, St. Clairsville, Ohio;*
C. C. Sedgwick,
*Assistant to Prosecuting Attorney of Belmont County, Bellaire, Ohio,*
*Attorneys for Appellees.*

No. 421. SECOND NATIONAL BANK *v.* FINDLEY, COUNTY TREASURER, ET AL.; and

No. 422. FIRST NATIONAL BANK *v.* FINDLEY, COUNTY TREASURER, ET AL. Appeals from the Supreme Court of Ohio. December 6, 1943. *Per Curiam:* The judgments

are affirmed on the authority of *Aberdeen Bank* v. *Chehalis County*, 166 U. S. 440, 443–6; *Citizens National Bank* v. *Kentucky*, 217 U. S. 443, 451; *Des Moines National Bank* v. *Fairweather*, 263 U. S. 103, 110–12; and *Colorado National Bank* v. *Bedford*, 310 U. S. 41, 52–3. *Mr. George Thornburg* for appellants. *Messrs. Ross Michener, A. G. Lancione,* and *C. C. Sedgwick* for appellees. Reported below: 142 Ohio St. 6, 50 N. E. 2d 157.